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Title: Midland Asphalt Corporation and Albert C. Litteer, Petitioners
v.
United States

Docketed:
May 20, 1988

Court: United States Court of Appeals for the Second Circuit

See also:
88-888

Counsel for petitioner: Greenbaum, Leslie M.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	May 20 1988	G	Petition for writ of certiorari filed.
2	Jun 3 1988		Brief of respondent United States filed.
3	Jun 7 1988		DISTRIBUTED. June 23, 1988
4	Jun 17 1988	X	Supplemental brief of respondent United States filed.
5	Jun 27 1988		Petition GRANTED.
			**********
6	Jul 7 1988	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
7	Aug 11 1988		Brief of petitioners Midland Asphalt Corp. and Albert Litteer filed.
9	Sep 9 1988		Order extending time to file brief of respondent on the merits until September 26, 1988.
10	Sep 15 1988		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
11	Sep 26 1988		Brief of respondent United States filed.
12	Oct 24 1988		SET FOR ARGUMENT. Tuesday, January 17, 1989. (4th case) (1 hr.)
13	Oct 24 1988		CIRCULATED.
14	Nov 2 1988		Record filed.
		*	1 Box - Certified original District Court and CA-2 proceedings.
15	Jan 17 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

87-1905

No. .....

Supreme Court, U.S.
FILED
MAY 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

MIDLAND ASPHALT CORPORATION
AND ALBERT C. LITTEER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

1. Does this Court's holding in *Mechanik v. United States*, 475 U.S. 66 (1986) authorize pre-trial appellate review of orders of the district courts declining to dismiss indictments for violations of F.R.Crim.P. 6(e) involving government abuse of the grand jury process?

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No. _____

In The
Supreme Court of the United States
October Term, 1987

MIDLAND ASPHALT CORPORATION
AND ALBERT C. LITTEER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Midland Asphalt Corporation* and Albert C. Litteer petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

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* Petitioner Midland Asphalt Corporation has no parent company, subsidiary or affiliate required to be listed pursuant to Supreme Court Rule No. 28.1.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of New York is not reported (App., infra, 1a). The opinion of the United States Court of Appeals for the Second Circuit is unreported (App., infra, 3a).

JURISDICTION

The opinion of the panel of the Court of Appeals was filed February 26, 1988. Petitioners' timely filed petition for rehearing was denied by the Court of Appeals on March 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and the time for filing this petition is governed by this Court's Rule 20.

CONSTITUTIONAL PROVISION INVOLVED

The case involves the fifth amendment right to be held to answer for a serious crime only upon the indictment of a grand jury. The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a Grand Jury, . . ."

STATUTORY PROVISION INVOLVED

The case involves 28 U.S.C. 1291 which provides in relevant part:

> "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

FEDERAL RULES INVOLVED

This case involves Rule 6(e) (2) and (6), Federal Rules of Criminal Procedure. Rule 6(e) (2) Federal Rules of Criminal Procedure provides in relevant part:

> ". . . an attorney for the government, or any person to whom disclosure is made under paragraph (3) (A) (ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules."

Rule 6(e) (6) Federal Rules of Criminal Procedure, provides:

> "Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury."

STATEMENT OF THE CASE

The basis for federal district court jurisdiction in the first instance is 18 U.S.C. § 3231.

Petitioners, a Buffalo, New York, family-owned contractor and its president were indicted by a grand jury for bid rigging in violation of 15 U.S.C. § 1 on January 23, 1987. Petitioners moved to dismiss the indictment for the government's violation of Rule 6(e) on the basis that attorneys for the government, prior to the return of the indictment, had disclosed matters occurring before the grand jury, namely, petitioners pre-indictment grand jury motions, which the government publicly filed in connection with another criminal case (to which Petitioners were not a party). The district court declined to dismiss the indictment because petitioners had filed no motion to seal the record in connection with petitioners' pre-indictment grand jury motions which were revealed by the government in the other criminal case. Court rules in effect at the time petitioners filed their pre-indictment grand jury motions required that all papers and proceedings be filed under seal.

Petitioners filed a timely notice of appeal to the United States Court of Appeals for the Second Circuit. The government filed a motion to dismiss the appeal on the basis that the order denying the motion to dismiss the indictment did not qualify as a final decision under the collateral order doctrine. The Court of Appeals agreed with the government holding that a violation of Rule 6(e) is not subject to the harmless error analysis of *United States v. Mechanik*, 475 U.S. 66 (1986) and could be reviewed on

appeal following trial if defendants were convicted. The Court of Appeals determined that because post-trial review might be available, interlocutory appeal was not.

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REASONS FOR GRANTING THE WRIT

A. The decision below is in conflict with United States v. Mechanik, 475 U.S. 66 (1986).

This case presents an important and unsettled question of whether *United States v. Mechanik* authorizes interlocutory appeal of a district court order refusing to dismiss an indictment for violations by the government of Rule 6(e), Federal Rules of Criminal Procedure.

In *Mechanik*, this Court determined that a violation of Federal Rule of Criminal Procedure 6(d) constituted harmless error because the subsequent conviction of the defendants rendered any error harmless. Justice Marshall noted in his dissent (475 U.S. at 81, n. 1) that denial of a motion to dismiss for a Rule 6(d) violation could be subject to interlocutory appeal under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) as a result of the Court's opinion in *Mechanik*. This Court has previously held in *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 267 (1982) that a district court's failure to dismiss an indictment on the grounds of prosecutorial vindictiveness is not subject to interlocutory appeal because the denial was effectively reviewable after conviction.

The analysis by this Court of the harmless error issue in *Mechanik* suggests that violations of Rule 6 of the Federal Rules of Criminal Procedure may not be effectively

reviewable after conviction where the effect of the conviction may be to render such grand jury error harmless. The Second Circuit Court of Appeals, however, distinguished the Rule 6(d) violation at issue in *Mechanik* from the Rule 6(e) violation at issue in this case and determined that a violation of Rule 6(e) does not affect the grand jury's decision to indict and therefore is not subject to the harmless error analysis of *Mechanik*.

B. The decision below is in conflict with decisions from the Ninth Circuit.

The Second Circuit Court of Appeals rejected the Ninth Circuit majority opinion *United States v. Benjamin*, 812 F.2d 548 (9th Cir. 1987). In *Benjamin* the Ninth Circuit held that a district court order denying a motion to dismiss for alleged violations of Rule 6(e), Federal Rules of Criminal Procedure, was appealable prior to trial because this Court's opinion in *Mechanik* rendered the issue effectively unreviewable after trial. The Ninth Circuit determined that a violation of Rule 6(e) is indistinguishable from a violation of Rule 6(d) because violations of either rule could taint the grand jury's decision to indict and such taint would be rendered harmless by a subsequent conviction.

The Tenth Circuit in *United States v. Taylor*, 798 F.2d 1337 (10th Cir. 1986) has interpreted *Mechanik* narrowly and has generally denied interlocutory review of orders declining to dismiss indictments for alleged grand jury irregularities on the ground that post-conviction review remains available for all such irregularities except alleged violations of Rule 6(d).

The First Circuit in *United States v. LaRouche Campaign*, 829 F.2d 250 (1st Cir. 1987) has held that post-conviction review remains available after *Mechanik* for various alleged grand jury abuses, including violations of Rule 6(e).

The four Circuit Courts of Appeals which have confronted this issue have taken four different approaches. The Ninth Circuit has allowed interlocutory appeals; the Tenth Circuit has held that Rule 6(e) violations which implicate a defendant's right to fundamental fairness in the charging process remain subject to post-conviction review and therefore are not subject to interlocutory review; the First Circuit has held that a district court's failure to dismiss an indictment for an alleged violation of Rule 6(e) is not subject to interlocutory appeal, but has suggested that even if such claims are not subject to post-conviction review, they are not important enough to merit interlocutory review. The Second Circuit has adopted the dissenting opinion from the Ninth Circuit decision in *Benjamin* distinguishing between violations of Rule 6(e) and 6(d), holding that violations of the former may still be subject to post-trial review and may therefore not be reviewed prior to final judgment.

C. The petition presents a substantial federal question.

The grand jury is too important an institution to effectively shield the prosecutor's powers over it from appellate review. Fundamental fairness in our criminal justice system demands that the historical role of the grand jury as an independent and unbiased body be zealously protected. The effective investigatory function of the grand

jury depends, in large part, upon the secrecy of the grand jury's proceedings so that witnesses need not fear any sanctions as a result of their testimony or identity becoming public information. If Justice Marshall's observation is correct that *Mechanik* is to be read broadly to mean that all grand jury misconduct becomes harmless after conviction (475 U.S. at 82), then it is likely that future prosecutorial misconduct in grand jury proceedings will be encouraged, as no effective sanction for such abuse will be available.

The weighing undertaken in *Mechanik* of the societal cost of the reversal of a conviction against the benefit to be achieved by a reversal of the conviction to discourage prosecutorial grand jury abuse suggests that the appropriate resolution include interlocutory, appellate review of such alleged abuse prior to the time that the societal cost of correcting such abuse becomes too substantial. Appeals in criminal cases are generally expedited so that the societal cost of an interlocutory appeal pales in comparison to the societal cost of rendering prosecutorial misconduct before the grand jury effectively unreviewable.

The decision of the Court below misconstrues the teachings of *Mechanik* and constitutes an important precedent to deny substantial constitutional rights to defendants in criminal cases. Moreover, it is in direct conflict with the *Benjamin* decision of the Ninth Circuit Court of Appeals.

———o———

CONCLUSION

For the reasons set forth herein, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-vs- CR-87-18C

MIDLAND ASPHALT CORPORATION and ALBERT C. LITTEER,

Defendants.

On September 30, 1987, this court issued a decision on several pending motions in this case (Item 38). In this same order, I directed that all parties make additional filings regarding defendants' Rule 6(e) motion before October 30, 1987 (*id.*, pp.3-4, 6). These documents have now been submitted to the court. *See* Items 37, 39, 41-43, 45-48.

As I stated in my September 30, 1987, filing, defendants argue that the indictment against them should be dismissed on the ground that the prosecution violated Rule 6(e) of the Federal Rules of Criminal Procedure by publicly filing an attachment originally filed in *In re Grand Jury Subpoena,* CIV-85-633E, as part of its memorandum in response to a motion filed by the defendants in *United States v. Allegany Bitumons,* CR-86-59C. Defendants also move for dismissal on the basis of disclosures made by the government at page 38 of that same memorandum.

In its original papers, the government opposed this motion based on the argument that the obligation of secrecy created by Rule 6(e) applies only to matters occurring before the grand jury. Item 35, p.14. The government claims that at the time the CIV-85-633E memoran-

dum was attached to its response memorandum in CR-86-59C, the information contained in it was a matter of public record. *Id.* at pp.15-16. Similarly, the government says that the information contained at page 38 of its memorandum in no way compromises the secrecy of the grand jury.

I find that defendants' motion to dismiss must be denied. Contrary to defendants' position, I find that the government did not reveal the nature of the grand jury's investigation by attaching a memorandum filed in CIV-85-633E to a memorandum filed in CR-86-59C. As the government points out in its papers, the defendants filed no motion to seal the record in CIV-85-633E, filed only one document under seal, and affirmatively stated at an October 2, 1985, hearing that Bradford Banks was subpoenaed as a grand jury witness.

In summary, defendants' Rule 6(e) motions are denied. This case is hereby transferred to the docket of United States District Judge David Larimer of the Western District of New York.

So ordered.

/s/ John T. Curtin
JOHN T. CURTIN
United States District Judge

Dated: December 18, 1987

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1987
(Argued: February 9, 1988 Decided: February 9, 1988
Opinion filed: February 26, 1988)

Docket No. 87-1546

UNITED STATES OF AMERICA,
Petitioner,

—v.—

MIDLAND ASPHALT CORPORATION and
ALBERT C. LITTEER,
Respondents.

Before:

CARDAMONE and PIERCE, *Circuit Judges*,
and STANTON, *District Judge.**

Motion to dismiss an appeal from a pretrial order of the United States District Court for the Western District of New York, John T. Curtin, *Ch. J.* Motion granted.

* Honorable Louis L. Stanton, District Judge, United States District Court for the Southern District of New York, sitting by designation.

LAURA HEISER, Esq., Washington, D.C. (John J. Powers, III, United States Department of Justice, Antitrust Division, Washington, D.C., Charles V. Reilly, United States Department of Justice, New York, N.Y., of counsel), *for Petitioner.*

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RICHARD J. BRAUN, Esq., Nashville, Tennessee (Thompson & Bussart, Nashville, Tennessee, of counsel), *for Respondent Albert C. Litteer.*

PIERCE, *Circuit Judge*:

In December, 1987, respondents Midland Asphalt Corporation ("Midland") and Albert C. Litteer, the defendants in an ongoing criminal antitrust prosecution in the United States District Court for the Western District of New York, filed a notice of appeal from two orders of the district court, John T. Curtin, *Ch. J.*, denying their motions to dismiss the indictment for alleged abuses of the grand jury process. In response, the United States filed a motion in this court to dismiss the appeal, or, in the alternative, for summary affirmance. Following oral argument, we entered an order granting the motion to dismiss, and we indicated that we would thereafter file a written opinion.

BACKGROUND

On January 23, 1987, a federal grand jury in the Western District of New York issued an indictment charging Midland, a corporation engaged in the sale of liquid bituminous material, and its president and part owner Albert C. Litteer, with a criminal violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982). The indictment charged that defendants and others conspired to allocate contracts and rig bids for the sale of liquid bituminous material to the State of New York and certain counties in western New York.

Thereafter, defendants simultaneously filed pretrial motions to dismiss the indictment on three separate grounds. First, they argued that the indictment violated Rule 7(c) of the Federal Rules of Criminal Procedure by failing to define the geographical area or specific counties within which the alleged activities took place. Second, they argued that the grand jury's failure to vote separately as to each prospective defendant violated each defendant's right not to be held to answer except on indictment by a grand jury. Third, they claimed that the government had violated Rule 6(e) of the Federal Rules of Criminal Procedure by disclosing details of the grand jury investigation to the public. On September 30, 1987, Chief Judge Curtin denied the motion to dismiss for violation of Rule 7(c), as well as the motion to dismiss for alleged voting irregularities. On December 18, 1987, Judge Curtin denied the motion to dismiss under Rule 6(e). On December 28, 1987, defendants filed a notice of appeal from the aforesaid orders. In response, the government filed a motion to dismiss the appeal for lack of appellate jurisdiction, or, in the alternative, for summary affirmance.

DISCUSSION

Under 28 U.S.C. § 1291 (1982), the federal courts of appeals have jurisdiction to review "all final decisions of the district courts," both civil and criminal. Thus, as a general rule, a party must raise all claims of error in a single appeal following a final judgment on the merits. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). Nevertheless, in some instances a decision may be "final" for purposes of § 1291 even though it is not the "last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). Under the collateral order doctrine, a pretrial order may be considered "final" and, hence, appealable if it falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). To qualify for immediate appeal under the collateral order doctrine, an order must meet three conditions: first, it must conclusively determine the disputed question; second, it must resolve an important issue completely separate from the merits of the action; and third, it must be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

In the present case, the government argues that an order denying a motion to dismiss an indictment for al-

leged grand jury abuses does not qualify as a final decision under the collateral order doctrine and, therefore, is not subject to interlocutory review. The Supreme Court has noted that adherence to the rule of finality is particularly important in criminal cases, "because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" *Abney v. United States*, 431 U.S. 651, 657 (1977) (quoting *DiBella v. United States*, 369 U.S. 121, 126 (1962)). Delay in criminal cases infringes not only upon the defendant's interest in the speedy resolution of the charges against him, but also upon society's interest in the prompt administration of justice. Over time, the prosecution's ability to prove its case diminishes as evidence deteriorates and witnesses' memories fade; society may be forced to bear the cost of extended pretrial detention or, alternatively, to assume the risk that defendants released pending trial may commit other crimes. *Flanagan v. United States*, 465 U.S. 259, 264-65 (1984). With these concerns in mind, the Supreme Court thus far has recognized the following types of pretrial orders in criminal cases that meet the requirements of the collateral order exception; an order denying a motion for reduction of bail, *Stack v. Boyle*, 342 U.S. 1 (1951); an order denying a motion to dismiss an indictment where it is claimed it violates the double jeopardy clause, *Abney*, 431 U.S. 651; and an order denying a motion to dismiss an indictment on the ground that it violates the speech and debate clause, *Helstoski v. Meanor*, 442 U.S. 500 (1979).[1] Apart

from these exceptions, the general rule is that an order denying a motion to dismiss an indictment is interlocutory and not appealable. *United States v. Beckerman*, 516 F.2d 905, 906 (2d Cir. 1975). *See also United States Tour Operators Ass'n v. Trans World Airlines*, 556 F.2d 126, 128 (2d Cir. 1977) (stating that "Attempts to come within the scope of the *Cohen* doctrine have been legion, but we have not been receptive to an expansive reading of this exception to the final judgment rule.").

Respondents argue, however, that in light of the Supreme Court's decision in *United States v. Mechanik*, 475 U.S. 66 (1986), the denial of their motions to dismiss the indictment is effectively unreviewable following the conclusion of trial, and therefore should be subject to interlocutory review. Respondents argue that, if they are acquitted, the denial of their motions to dismiss will be moot; however, if they are convicted, the grand jury abuses of which they complain will be deemed harmless error under *Mechanik*, and thus insufficient to warrant reversing the convictions. Respondents find support for

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[1] Three circuit courts, including this one, have held that the reasoning of *Helstoski* entitles a federal official to pretrial review of a challenge to an indictment based on the doctrine of separation of powers. *See United States v. Claiborne*, 727 F.2d 842 (9th Cir.) (federal Judge entitled to immediate review of denial of motion to dismiss indictment on ground of separation of powers), *cert. denied*, 469 U.S. 829 (1984); *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982) (same), *cert. denied*, 459 U.S. 1203 (1983); *United States v. Myers*, 635 F.2d 932 (2d Cir.) (congressman), 449 U.S. 956 (1980). *Cf. Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987) (no pretrial appellate review of denial of motion to dismiss based on argument that independent counsel law is unconstitutional).

this argument in the dissenting opinion in *Mechanik*, 475 U.S. at 81 n. 1 (Marshall, J., dissenting), as well as in two circuit court cases, *see United States v. Dederich*, 825 F.2d 1317 (9th Cir. 1987); *United States v. Benjamin*, 812 F.2d 548 (9th Cir. 1987). At least two other circuits, however, have reached the opposite conclusion. *See United States v. LaRouche Campaign*, 829 F.2d 250 (1st Cir. 1987); *United States v. Taylor*, 798 F.2d 1337 (10th Cir. 1986). We turn now to consider whether respondents' appeal is permissible under the *Cohen* collateral order doctrine.

I. *The September 30 Order*

We need not linger over respondents' contention that the September 30, 1987 order of the district court, which denied the motions to dismiss the indictment for alleged grand jury voting irregularities and for lack of specificity as to the location of the alleged criminal activity, is subject to interlocutory review. Even if we assume, for the sake of argument, that this order could be the subject of an interlocutory appeal, a straightforward application of Rule 4(b) of the Federal Rules of Appellate Procedure would preclude this court from entertaining the appeal. Rule 4(b) states, *inter alia*, that "[i]n a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from," unless the district court grants an extension of time upon a showing of excusable neglect. Thus, whatever right respondents may have had to interlocutory review of the September 30 order expired on October 10, 1987. Any right that respondents still have to contest this order may be exercised, if at all, following the termination of criminal proceedings in the district court.

II. *The December 18 Order*

Because the notice of appeal was timely filed with respect to the December 18 ruling, we must decide whether *Mechanik* compels us to review an interlocutory order denying a motion to dismiss a criminal indictment for violation of Rule 6(e). To understand respondents' argument in favor of appealability requires a brief discussion of the *Mechanik* decision.

In *Mechanik*, the defendants in a conspiracy case discovered, two weeks into trial, that the government had presented to the grand jury the testimony of two law enforcement agents who were sworn together and questioned in tandem. The defendants then moved for dismissal of the indictment on the ground that the simultaneous presence of the two agents before the grand jury violated Fed. R. Crim. P. 6(d).[2] The district judge took the matter under

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[2] Fed. R. Crim. P. 6(d) states:

> Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

By contrast, Rule 6(e)(2) states:

> General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcripes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

advisement pending the conclusion of trial. After the jury returned a verdict of guilty, the judge denied the motion to dismiss, reasoning that, even though the presence of the agents violated Rule 6(d), the error was harmless. The Court of Appeals for the Fourth Circuit reversed. The Supreme Court, however, reversed the Fourth Circuit and reinstated the convictions.

In reaching its conclusion that the grand jury violation was merely harmless error, the Court reasoned, first, that Rule 6(d) is designed to ensure that grand jurors, sitting without direct supervision of a judge, are not subject to undue influence that may come with the presence of unauthorized persons. Thus, the Rule protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty. *Mechanik*, 475 U.S. at 70. The petit jury's subsequent decision to return a guilty verdict, the Court held, demonstrates not only that there was probable cause to believe that the defendants were in fact guilty as charged, but also that they were in fact guilty beyond a reasonable doubt. *Id.* Therefore, a majority of the Court concluded that any error in the grand jury proceeding was harmless beyond a reasonable doubt.

Since *Mechanik*, three circuit courts of appeals have addressed the issue, raised by Justice Marshall in his dissent, of whether allegations of grand jury abuses are effectively unreviewable post-conviction, and, if so, whether the denial of a motion to dismiss an indictment for violations of Rule 6 is subject to interlocutory review. The Tenth Circuit has interpreted *Mechanik* narrowly so as not to preclude post-conviction review of most allegations of

grand jury irregularities; as a result, interlocutory review is still strongly disfavored. In *United States v. Taylor*, 798 F.2d 1337, the defendants had moved in the district court for dismissal of the indictment on several grounds, including (1) invasion of the defense camp by the prosecution in violation of the attorney-client privilege and the sixth amendment; (2) abuse of the grand jury through prosecutorial misconduct, in the form of (a) failure to present exculpatory evidence to the grand jury, and (b) causing the grand jury to be biased by presenting inadmissible, inflammatory, and prejudicial evidence; and (3) improper utilization of state officers in the grand jury investigation. The district court denied the motion, and the defendants appealed. *See id.* at 1338. The Tenth Circuit dismissed the appeal, reasoning that, *Mechanik* notwithstanding, the denial of the motion to dismiss the indictment *would* be reviewable after final judgment. In reaching this conclusion, the court distinguished between the right at stake in *Mechanik*—which the court characterized as "the right not to stand accused except upon a finding of probable cause"—and "a broader right to fundamental fairness throughout the criminal process," which arguably was implicated under the facts of *Taylor*. *Id.* at 1340. The court noted that, in *Mechanik*, no allegations were made that the government had attempted to unfairly sway the grand jury or to otherwise affect the fairness of the accusatory process; "[i]n short, there was no question whether the government had transgressed the defendants' rights to fundamental fairness." *Id.* At most, the error in *Mechanik* could have affected only the grand jury's determination of probable cause, and since the outcome of the trial effectively eliminated any question of whether there was probable cause,

the error was harmless. *Id.* The errors presented to the court in *Taylor,* however, were not "of the technical variety." Instead, the defendants were asserting that their right to fundamental fairness had been adversely affected by certain governmental activities. Thus, a petit jury determination of guilt would not moot these issues, the court reasoned, because "they go beyond the question of whether the grand jury had sufficient evidence upon which to return an indictment." *Id.* Accordingly, the *Taylor* court held that the issues raised by the defendants would be appealable after a final judgment of conviction.

On the other hand, the Ninth Circuit has construed *Mechanik* broadly, so as to preclude most post-conviction review of alleged grand jury abuses. As a result, the Ninth Circuit has taken a very liberal approach towards interlocutory review of orders denying Rule 6 motions to dismiss. For example, in *United States v. Benjamin,* 812 F.2d 548, the defendants had moved to dismiss the indictment on the ground that the government had violated Rule 6(e) by disclosing certain records of the grand jury proceedings. The court held that an interlocutory appeal of the district court's denial of the motion to dismiss was permissible, because the matter *would* be effectively unreviewable after a final judgment. Unlike the Tenth Circuit, the Ninth found no meaningful distinction based on the fact that *Mechanik* involved a violation of Rule 6(d), while the case before the court involved a violation of Rule 6(e). Either violation, reasoned the court, could taint the grand jury's decision to indict; yet under *Mechanik* such a taint would be rendered harmless if the petit jury convicted the defendants. Since the denial of the motion to dismiss the indictment would be effectively unreviewable following a judgment of conviction, the court decided to entertain the interlocutory appeal. *See Benjamin,* 812 F.2d at 550-54.

One judge dissented from the court's decision in *Benjamin,* on the ground that a distinction *could* be drawn between a Rule 6(d) violation, which was at issue in *Mechanik,* and a Rule 6(e) violation, which was at issue in the case before the court. According to the dissenting judge, Rule 6(d) is designed, in part, to ensure that grand juries are not subject to undue influence in their decision to indict. *Id.* at 555 (Thompson, J., dissenting). Rule 6(e), on the other hand, codifies the traditional rule of grand jury secrecy, which is necessary (1) to encourage witnesses to testify freely; (2) to prevent persons under investigation from learning of their status, lest they flee; and (3) to protect from public ridicule those who are exonerated by the grand jury. *Id.* at 555-56 (citing *Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 211, 219 (1979)). Normally, argued the dissent, a violation of Rule 6(e) will not affect the grand jury's decision to indict. Therefore, even if appellants were convicted at trial, *Mechanik* would not preclude post-trial review of the issue they sought to raise on appeal.

More recently, the First Circuit has developed yet another perspective on the appealability issue. In *United States v. LaRouche Campaign,* 829 F.2d 250, the court denied interlocutory review of a district court's denial of a motion to dismiss the indictment for violation of Rule 6(e). The court agreed with the Tenth Circuit in *Taylor* that *Mechanik* would not necessarily preclude relief after conviction, because the alleged grand jury abuses (violation of secrecy rules, presentation of misleading evidence,

the government's trying the case in the press) were different from the somewhat "technical" violations present in *Mechanik*. *Id.* at 253. The court went on to decide, however, that even if *Mechanik* should be broadly construed so that post-conviction relief for violations of Rule 6 is routinely denied, interlocutory review would nevertheless be foreclosed. The court noted that, under *Cohen,* interlocutory review is permitted only if an order finally determines claims of right "*too important* to be denied review." *Id.* at 254 (citing *Cohen,* 337 U.S. at 546) (emphasis in *LaRouche*). Reasoning that "it would be the rare alleged abuse of the grand jury process which, while not important enough to warrant relief on direct appeal from a judgment of conviction, would be important enough to warrant the extraordinary step of an interlocutory appeal in a criminal case," the court dismissed the appeal. *Id.*

The case law noted above suggests a number of different approaches to the appealability issue now before us. On the one hand, we could choose to adopt the Ninth Circuit's broad reading of *Mechanik,* and hold that Judge Curtin's December 18 order denying the Rule 6(e) motion to dismiss is effectively unreviewable after trial; this might suggest that interlocutory review would be appropriate. On the other hand, we could choose to follow the First Circuit's reasoning and hold that, even if there can be no appeal from such an order following the termination of district court proceedings, the underlying claim is simply not "important" enough to merit interlocutory review. Yet another alternative would be to follow the Tenth Circuit's interpretation of *Mechanik,* and hold that Rule 6 challenges that implicate the defendant's right to fundamental fairness in the charging process, as opposed to

mere "technical" challenges, are still subject to post-trial (but not interlocutory) review.

For purposes of deciding the motion before us, we find most persuasive the logic expressed in the dissent in the Ninth Circuit's *Benjamin.* As it observed, the rule at issue in *Mechanik,* Rule 6(d), primarily serves to protect grand juries from being unduly influenced by persons not authorized to appear before them, and thereby to protect the person under investigation from being indicted in the absence of probable cause. Therefore, as the Supreme Court instructed in *Mechanik,* a violation of Rule 6(d) is harmless error if the petit jury subsequently convicts the defendant since a conviction indicates that there *was* probable cause to indict. Rule 6(e), on the other hand, serves a very different function. The non-disclosure provisions of Rule 6(e) protect society's interest in keeping secret the identity of grand jury witnesses and persons under investigation. *Douglas Oil,* 441 U.S. at 219. In addition, by limiting the amount of potentially prejudicial information that can be disclosed prior to trial, Rule 6(e) safeguards the interests of society and of the defendant in receiving a fair trial. Therefore, unlike a violation of Rule 6(d), a violation of Rule 6(e) is not rendered harmless simply because the defendant is convicted; at least in some instances, the more egregious the violation of Rule 6(e), the more *likely* it becomes that the petit jury will convict. Accordingly, we do not believe that *Mechanik* precludes a federal court of appeals from exercising post-trial review of an order denying a motion to dismiss an indictment for violation of Rule 6(e). By the same token, we

believe a Rule 6(e) challenge does not qualify for immediate review under the collateral order doctrine.[3]

We therefore hold that since the order herein denying the motion to dismiss the indictment for an alleged violation of Rule 6(e) is likely to be appealable following trial if the defendants are convicted, the order is not subject to interlocutory appellate review.

The motion to dismiss the appeal is granted.

---

[3] Of course, dismissal of the indictment for violation of Rule 6 is a drastic remedy that would be applicable only under unusual circumstances. *See, e.g., United States v. Thibadeau,* 671 F.2d 75, 77-78 (2d Cir. 1982). Ordinarily, a contempt citation or some less sweeping measure would be appropriate.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 25th day of March one thousand nine hundred and eighty-eight.

FILED MARCH 25, 1988

UNITED STATES OF AMERICA,

Appellee,

v. No. 87-1546

MIDLAND ASPHALT CORPORATION
and ALBERT C. LITEER,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Midland Asphalt Corporation and Albert C. Litteer,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

SO ORDERED:

FOR THE COURT

Elaine B. Goldsmith
Clerk

3-25-88 By: /s/ Kathleen Brower
Date

RESPONDENT'S

BRIEF

(3)

No. 87-1905

Supreme Court, U.S.
FILED
JUN 3 1988

In the Supreme Court of the United States

OCTOBER TERM, 1987

MIDLAND ASPHALT CORP., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an order denying a motion to dismiss an indictment for an alleged violation of Fed. R. Crim. P. 6(e) may be appealed, prior to a final judgment of conviction, under the collateral order doctrine.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-17) is reported at 840 F.2d 1040. The order of the district court denying petitioners' motion to dismiss the indictment (Pet. App. 1-2) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1988. A petition for rehearing was denied on March 25, 1988 (Pet. App. 18). The petition for a writ of certiorari was filed on May 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Midland Asphalt Corporation, Inc. (Midland) is a corporation engaged in the sale of liquid

bituminous material. Petitioner Albert C. Litteer is Midland's president and part owner. On Januay 23, 1987, a federal grand jury in the Western District of New York returned an indictment charging petitioners with conspiring to allocate contracts and rig bids for the sale of liquid bituminous material to the State of New York and to certain counties in western New York, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. 5.

Petitioners thereafter moved to dismiss the indictment. They alleged (1) that the indictment was insufficient under Fed. R. Crim. P. 7(c), because it purportedly failed to define the geographical area in which the crime took place; (2) that the grand jury's failure to vote separately as to each prospective defendant violated petitioners' right not to be tried except upon indictment by a grand jury; and (3) that the government had violated Fed. R. Crim. P. 6(e) by disclosing details of the grand jury investigation to the public. More specifically, petitioners claimed that the government had violated Rule 6(e) by filing with the court, in connection with a separate case, a legal memorandum that reflected matters occurring before the grand jury in the present case. Pet. App. 5; Pet. 4.

2. On September 30, 1987, the district court denied all but petitioners' Rule 6(e) motion (9/30/87 Order 1-6). The court found (*id.* at 2-3) that "the 'place' element of the alleged criminal violations is adequately set forth in paragraph 15 of the indictment." It also held (*id.* at 5) that "[n]either Rule 6 of the Federal Rules of Criminal Procedure, nor the case law in the Second Circuit, require the Grand Jury to vote on each defendant separately." With respect to petitioners' Rule 6(e) motion, however, the court directed the parties to submit additional evidence bearing on the allegations in that motion (9/30/87 Order 3-4).

On December 18, 1987, the district court denied petitioners' motion to dismiss the indictment under Rule 6(e)

(Pet. App. 1-2). The court found (*id.* at 2) that the government had not revealed matters occurring before the grand jury when it filed its legal memorandum. It noted (*ibid.*) that virtually all the information in the government's memorandum was based on documents and proceedings that had previously been made public and that the government therefore had not violated Rule 6(e) by incorporating those materials in the memorandum that it submitted to the court.

3. The court of appeals dismissed petitioners' appeal from the district court's orders (Pet. App. 3-17). The court first declined (*id.* at 9) to review the district court's September 30 order, explaining that petitioner had failed to file a timely notice of appeal from that order.* The court next held (*id.* at 10-17) that the December 18 order was not appealable prior to a final judgment of conviction. It rejected petitioners' contention that, in light of this Court's decision in *United States* v. *Mechanik*, 475 U.S. 66 (1986), an order denying a motion to dismiss an indictment under Rule 6(e) is "effectively unreviewable on appeal from a final judgment" (Pet. App. 6) and is therefore immediately appealable as a collateral order under *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The court acknowledged that the circuits have taken "a number of different approaches to the appealability issue" (Pet. App. 15). After canvassing those approaches, the court stated (*id.* at 16) that it was persuaded by the dissenting opinion in the Ninth Circuit's decision in *United States* v. *Benjamin*, 812 F.2d 548 (1987). The court explained (Pet. App. 16) that whereas the Rule 6(d) violation in *Mechanik* affected only the grand jury's capacity to make a fair determination of probable cause, Rule 6(e) serves the "very different function" of "protect[ing] society's interest

* The petition does not present that issue.

in keeping secret the identity of grand jury witnesses and persons under investigation" and "safeguard[ing] the interests of society and of the defendant in receiving a fair trial." Applying "the logic expressed in the [*Benjamin*] dissent" (*ibid.*), the court of appeals stated that "unlike a violation of Rule 6(d), a violation of Rule 6(e) is not rendered harmless simply because the defendant is convicted" (*ibid.*). Accordingly, the court reasoned, petitioners would not be foreclosed from pressing their Rule 6(e) claim after a verdict of conviction. "By the same token," the court concluded, "a Rule 6(e) challenge does not qualify for immediate review under the collateral order doctrine" (Pet. App. 16-17 (footnote omitted)).

DISCUSSION

Petitioners ask this Court to review the court of appeals' decision that an order denying a motion to dismiss an indictment for an alleged violation of Rule 6(e) is not appealable as a collateral order under *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). We agree with the court of appeals that the collateral order doctrine does not apply in this case. Nevertheless, because the courts of appeals have taken very different approaches to this and closely related issues, and because the appealability of grand jury claims prior to verdict presents an issue of substantial and recurring practical importance, we agree that the case warrants review by this Court.

1. As petitioners note (Pet. 7), the courts of appeals have taken differing approaches to the appealability of claims of grand jury error. The Ninth Circuit, in *United States* v. *Benjamin*, 812 F.2d 548 (1987), and *United States* v. *Dederich*, 825 F.2d 1317 (1987), has held that all grand jury claims may be raised on interlocutory appeal. The court reached that conclusion after first finding that

Mechanik bars any post-conviction appeal challenging errors committed in connection with a grand jury investigation; in the absence of a right to post-conviction review, the court held, a defendant is entitled to raise such claims on appeal before trial. In contrast, the First Circuit has held that the denial of a motion to dismiss on grounds of grand jury error may not be reviewed before trial, even if the claim could not be raised after trial because of *Mechanik*. See *United States* v. *LaRouche Campaign*, 829 F.2d 250 (1987). The Tenth Circuit, in *United States* v. *Taylor*, 798 F.2d 1337 (1986), has also refused to entertain an interlocutory appeal from the denial of a motion to dismiss on grounds of grand jury abuse, but for a different reason: in the Tenth Circuit's view, claims of serious grand jury error may be raised after conviction notwithstanding *Mechanik*; accordingly, there is no need to permit such claims to be the subject of pretrial appeals. The Second Circuit adopted a substantially similar position in the present case.

2. We believe that the court of appeals was correct in holding that an order denying a motion to dismiss an indictment under Rule 6(e) is not immediately appealable under the collateral order doctrine. But the appealability issue, which may arise in every case involving claims of grand jury error, is of considerable and recurring practical importance. Because there is now a firmly established split in the circuits on the proper approach for courts to take in resolving challenges to grand jury actions, we believe that it would be appropriate for the Court to review the issue at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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SUPPLEMENTAL

MEMORANDUM

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In the Supreme Court of the United States

OCTOBER TERM, 1987

MIDLAND ASPHALT CORP., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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In our brief in response to the petition in this case, we explained that the courts of appeals are divided on the question whether claims of grand jury error are immediately appealable, and we therefore agreed that the petition for a writ of certiorari should be granted.

Since our filing, we have learned of a recent decision of the Seventh Circuit which further reflects the split in the circuits on the question presented. In *United States* v. *Daniels,* No. 88-1767 (May 31, 1988), several defendants sought leave to withdraw their guilty pleas on the ground that the grand jury that indicted them had been serving beyond its term. The district court rejected that claim. On appeal, the Seventh Circuit dismissed for want of appellate jurisdiction. The court of appeals rejected the con-

tention that interlocutory review of the grand jury claim was required by this Court's decision in *United States* v. *Mechanik*, 475 U.S. 66 (1986). It reasoned, in part, that "to the extent *Mechanik* bars review of grand jury questions on appeal from the final judgment, it does so because any errors are too insignificant to call for correction. If the errors are too insignificant after conviction, they are too insignificant before conviction." *Daniels*, slip op. 3.

The *Daniels* court noted that declining to permit grand jury errors to be the subject of interlocutory appeals is consistent with the policies underlying the strong presumption against such appeals, particularly in criminal cases. The court observed (slip op. 3) that "[m]ultiple appeals produce leaden-footed justice and divert the time of courts from more pressing questions raised by other parties." Moreover, the court explained (*ibid.*), "[d]efects in the initiation of [criminal] proceedings do not create 'rights not to be tried.' " In rejecting the defendants' claim of a right to interlocutory appeal with respect to grand jury errors, the court of appeals relied on the First Circuit's decision in *United States* v. *LaRouche Campaign*, 829 F.2d 250 (1987), and cited as conflicting authority the Ninth Circuit's decision in *United States* v. *Dederich*, 825 F.2d 1317 (1987).

The decision of the Seventh Circuit in *Daniels* confirms our belief that it would be appropriate for the Court to grant review of the question presented in this case.

Respectfully submitted.

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JUNE 1988

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PETITIONER'S

BRIEF

(5)

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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

1. Does this Court's holding in *Mechanik v. United States*, 475 U.S. 66 (1986) authorize pre-trial appellate review of orders of the district courts declining to dismiss indictments for violations of F.R.Crim.P. 6(e) involving government abuse of the grand jury process?

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No. 87-1905

In The

Supreme Court of the United States

October Term, 1987

MIDLAND ASPHALT CORPORATION
AND ALBERT C. LITTEER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

BRIEF FOR PETITIONERS MIDLAND ASPHALT CORPORATION AND ALBERT C. LITTEER

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 3-17) is reported at 840 F.2d 1040.[1] The opinion of the district court (Pet. App. 1-2) is unreported.

[1] "Pet. App." refers to the appendix to the petition in No. 87-1905.

JURISDICTION

The order of the Court of Appeals was entered on February 9, 1988. The petition for rehearing en banc was denied on March 25, 1988 (Pet. App. 18-19). The petition for a writ of certiorari was filed on May 20, 1988. The petition was granted on June 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTE AND RULES INVOLVED

The case involves 28 U.S.C. 1291 which provides in relevant part:

"the Courts of Appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

The case involves Rule 6(e)(2) and (6), Federal Rules of Criminal Procedure. Rule 6(e)(2) Federal Rules of Criminal Procedure provides in relevant part:

". . . an attorney for the government, or any person to whom disclosure is made under (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules."

Rule 6(e)(6) Federal Rules of Criminal Procedure, provides:

"Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury."

The case also involves Rule 52(a), Federal Rules of Criminal Procedure, which provides:

"Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

CONSTITUTIONAL PROVISION INVOLVED

The case involves the right under the Fifth Amendment to the Constitution of the United States to be held to answer for a serious crime only upon the indictment of a grand jury. The Fifth Amendment to the Constitution of the United States provides in relevant part:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a Grand Jury, . . ."

STATEMENT

Petitioners, a Buffalo, New York, family-owned contractor and its president were indicted for bid rigging in violation of 15 U.S.C. § 1 on January 23, 1987, after a grand jury investigation of approximately 23 months. At least three attorneys from the Antitrust Division of the Department of Justice assisted the grand jury.

Petitioners moved to dismiss the indictment for the government's violation of Rule 6(e) of the Federal Rules of Criminal Procedure on the basis that attorneys for the government, prior to the return of the indictment, had disclosed matters occurring before the grand jury. Petitioners alleged that the government's May, 1986 public filing of its response to petitioners' preindictment grand jury motions

in connection with another criminal case (to which petitioners were not a party) constituted a violation of Rule 6(e) and prejudiced petitioners (D.E. 34).[2] The motion to dismiss alleged that the government's public filing in connection with an unrelated criminal case of the government's response to grand jury motions filed by petitioner Midland Asphalt Corporation and its officer Bradford Banks violated Rule 6(e) by disclosing the nature and focus of the investigation, the name of a grand jury witness and petitioners' target status as well as the fact that petitioner Midland Asphalt Corporation had filed several grand jury motions (D.E. 34). Petitioners also filed motions for discovery of the grand jury transcripts and the instructions given by the government to the grand jury (D.E. 13, 15).

The government, in its response to petitioners' motion to dismiss, argued that the policy of grand jury secrecy was designed to protect from disclosure only the essence of what takes place in the grand jury room and that if information was not being revealed for the purpose of exposing what took place before the grand jury and its release did not seriously compromise the secrecy of the grand jury's deliberations, Rule 6(e) had not been violated (D.E. 35, p. 18). The government also argued that the various motions of petitioners and the government's responses to the motions were never put before the grand jury (D.E. 35, p. 20).

Petitioners requested that the district court review *in camera* the grand jury transcripts and the instructions

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[2] "D.E." refers to the Docket Entries of the District Court.

given by the government to the grand jury to determine whether or not petitioners were prejudiced by the government's revelations in the unrelated criminal case. The district court declined to do so (D.E. 36, pp. 44-47). Petitioners brought to the attention of the district court the government's inconsistent position on the breath of Rule 6(e) contained in the government's brief in *In re: January 1985 Antitrust Grand Jury*, No. 85-5218ND (8th Cir. 1985) (D.E. 47).

The district court declined to dismiss the indictment on the grounds that petitioners had filed no motion to seal the record in connection with the preindictment grand jury motions which were revealed by the government in the other criminal case. The district court did not address Rule 6(e)(6) which requires that records relating to grand jury proceedings be kept under seal to prevent disclosure of matters occurring before the grand jury (Pet. App. 1-2). Petitioners appealed the district court's order denying their motions to dismiss the indictment to the United States Court of Appeals for the Second Circuit. The government moved to dismiss the appeal on the basis that the order denying the motion to dismiss did not qualify as a final decision under the collateral order doctrine. The Second Circuit Court of Appeals dismissed the appeal and distinguished the Rule 6(d) violation at issue in *United States v. Mechanik*, 475 U.S. 66 (1986) from the Rule 6(e) violation at issue in the case at bar (Pet. App. 16). The Second Circuit Court of Appeals adopted the logic expressed in the dissent in the Ninth Circuit decision in *United States v. Benjamin*, 812 F.2d 548 (9th Cir. 1987) (Pet. App. 16). The dissent in *Benjamin* argued that a violation of Rule 6(e) will normally not have

an effect on the grand jury's decision to indict and, therefore, such a violation would be reviewable on appeal after a conviction (Pet. App. 14). The Second Circuit Court of Appeals concluded that a violation of Rule 6(e) is not rendered harmless by a conviction because the more egregious the violation of Rule 6(e), the more likely it becomes that the petit jury will convict. (Pet. App. 16). This conclusion presumably arises from the risk that the Rule 6(e) disclosures could serve to inflame or prejudice the petit jurors. The Court of Appeals did not explain why such disclosures would make it more likely that the petit jury would convict, while having no effect whatsoever on the grand jurors.

The Second Circuit Court of Appeals concluded that this Court's decision in *United States v. Mechanik*, 475 U.S. 66 (1986) would not preclude post-trial review of an order denying a motion to dismiss an indictment for a violation of Rule 6(e). The Second Circuit Court of Appeals did not opine whether such post-conviction review would be limited to the impact of a violation of Rule 6(e) on the petit jury or whether such review would include an analysis of the impact of the violation on the grand jury's decision to indict (Pet. App. 16). The Court of Appeals concluded that interlocutory review under the collateral order doctrine was not available based solely on its conclusion that post-conviction review was available.

SUMMARY OF ARGUMENT

The government committed a clear Rule 6(e) violation in this case. Violations of Rule 6(e) by the government are capable of prejudicing a potential defendant by impacting adversely upon the grand jury's independence and causing the grand jury to become biased. *In Re Grand Jury Investigation (Lance)*, 610 F.2d 202 (5th Cir. 1980); *United States v. Eisenberg*, 711 F.2d 959 (11th Cir. 1983). Means of potential prejudice include the creation of adverse preindictment publicity which may inflame the general public and the grand jurors to become prejudiced against a prospective accused. Unauthorized disclosures of grand jury material may pressure a target into cooperating with the government, or many inhibit grand jurors from engaging in unrestricted deliberations in fear that their open and frank discussions may become public. Unauthorized disclosures of grand jury information protected by Rule 6(e) may also inhibit grand jurors from asking government attorneys relevant questions necessary to meaningful deliberations. In addition, witnesses may testify in such a way as to favor what they believe the government wants to hear in order to avoid government retaliation by the public disclosure of their grand jury testimony or their role in the investigation. In addition, as in the case at bar, the disclosure that the defendants had filed various motions at the grand jury stage may cause the grand jurors and the public to believe that such conduct represented evidence of a consciousness of guilt, itself justifying a vote in favor of an indictment. Unauthorized disclosure of the names of targets may cause disgruntled

competitors of the target to importune grand jurors to persuade them to vote for an indictment or to importune potential witnesses to persuade such witnesses to testify unfavorably toward the publicly named target.

Such prejudice has the serious potential for undermining the grand jury's independence by creating a biased grand jury and denying a potential accused his right not to be held to answer except on the indictment of an unbiased grand jury. *Costello v. United States,* 350 U.S. 359 (1956); *United States v. Sears, Roebuck & Co.,* 719 F.2d 1386 (9th Cir. 1983), *cert. denied,* 465 U.S. 1079 (1984).

One of the benefits of citizenship is the constitutional right not to be required to stand trial except upon a charge returned by an independent and unbiased grand jury. *Stirone v. United States,* 361 U.S. 212 (1960). This Court has long recognized the importance of the grand jury's function of standing as a bulwark between the government and a potential accused. The right not to be required to be held to answer except upon indictment by an independent and unbiased grand jury has no less importance than the constitutional right not to be tried twice for the same offense, *Abney v. United States,* 431 U.S. 651 (1977), and the right not to be tried upon an indictment in violation of the speech and debate clause, *Helstoski v. Meanor,* 442 U.S. 500 (1979). Each of these cases, like the case at bar, involved a constitutional right not to be held to answer at all. Such a right, unless vindicated prior to a trial, is irretrievably lost and, therefore, an appeal based on a denial of that right meets the collateral order requirements of *Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541 (1949).

When a defendant, prior to the commencement of the criminal trial, brings to the attention of the district court a violation of Rule 6(e) and demonstrates by a preponderance of the evidence that the improper disclosures of grand jury matters were made or caused to be made by the government, the district court should require the government to produce for the defendant the grand jury transcripts, including the instructions given by the government to the grand jury, and hold a hearing to determine whether or not the improper and unauthorized disclosure prejudiced the defendants and undermined the grand jury's independence. At a very minimum, the district court should be required to review grand jury transcripts, including the instructions to the grand jurors, *in camera,* to determine whether the independence of the grand jury was undermined by the improper government disclosures. If the court finds potential prejudice to the defendant following such *in camera* review, transcripts and instructions, should be disclosed to the defendants and an evidentiary hearing held to determine whether the grand jury's independence was compromised. If the violation of Rule 6(e) by the government is found to have substantially influenced the grand jury's decision to indict or if there is grave doubt that the decision to indict was free from the substantial influence of such violations, the district court should then dismiss the indictment. *Bank of Nova Scotia v. United States,* 108 S.Ct. 2369 (1988).

Where a Rule 6(e) violation by the government is called to the district court's attention prior to trial, the societal cost of the error is minimized by permitting pretrial appellate review prior to expanding the governmental, judicial and human resources which a trial entails. No

lesser remedy can serve to protect a citizen's Fifth Amendment right not to be held to answer except upon the indictment of an unbiased and independent grand jury. No lesser remedy can preserve the grand jury's historic role as a shield between the government and the accused. The grand jury's role as a shield is crucial to the preservation of a free and open society. It is the only means of protecting a citizen against arbitrary prosecution.

Dismissal serves to deter such unauthorized and improper conduct by government attorneys. Contempt is an illusory deterrent to such conduct. A defendant is not likely to risk incurring the wrath of a prosecutor or his office. A defendant is at the mercy of the prosecutor and his office with respect to plea bargaining, sentencing and trial cooperation. Those same practical considerations make it unlikely that a defendant will seek other disciplinary sanctions against a prosecutor.

The only significant deterrent to such prosecutorial misconduct, which strikes at the heart of the grand jury's ability to function as an independent and unbiased body of citizens, is dismissal in those circumstances in which such improper conduct prejudices a defendant by depriving him of his right to an independent and unbiased grand jury. Appellate review of such determinations under the collateral order doctrine is necessary in order to insure that a defendant will not be held to answer except upon indictment by the independent and unbiased grand jury guaranteed him under the United States Constitution.

ARGUMENT

I. THE GOVERNMENT COMMITTED A VIOLATION OF RULE 6(e), FEDERAL RULES OF CRIMINAL PROCEDURE

A. The Government Publicly Disclosed A Grand Jury Memorandum

On May 5, 1986, the government publicly filed and served its memorandum in opposition to certain motions of defendants in *United States v. Allegany Bitumens, Inc.* No. CR 86-59C, pending in the United States District Court for the Western District of New York. Attached to that memorandum was a memorandum styled *In Re Antitrust Grand Jury Investigation* which was the government's memorandum in response to earlier motions of petitioner Midland Asphalt Corporation and its vice president, Brandford Banks, for an order requiring government agents to retain rough notes of interviews and for an order to compel the government to affirm or deny any interception of wire or oral communications of grand jury witness Banks. During 1986, the grand jury in the Western District of New York was investigating petitioners Midland Asphalt Corporation and Litteer, among others, for possible antitrust violations in the road paving industry. Midland Asphalt Corporation and Litteer were subsequently indicted on January 23, 1987.

The government's memorandum in response to the grand jury motions of Midland Asphalt Corporation and Banks in *In re Antitrust Grand Jury Investigation*, publicly filed in CR 86-59C, revealed that Banks and Midland had previously filed grand jury motions for orders requir-

ing the government to retain rough notes of interviews and for an order to compel the government to affirm or deny any interception of wire or oral communication of Banks. The government grand jury memorandum revealed that the grand jury was investigating, under antitrust statutes, persons presently or formerly engaged in the road paving business in the State of New York. The government grand jury memorandum also revealed that Midland Asphalt Corporation had filed two previous grand jury motions. The government memorandum further revealed that Banks had not yet appeared before the grand jury and was appearing as an individual, rather than as a representative of Midland Asphalt Corporation. The government's grand jury memorandum contained an offer to inform the Court, *ex parte*, whether or not it possessed any evidence obtained by electronic surveillance.

In response to the petitioners' motions to dismiss the indictment for the government's violation of Rule 6(e), the government argued that no Rule 6(e) violation had occurred. The government argued that the information contained in its publicly filed grand jury memorandum was already a matter of public record, because it had not been preserved under seal as required by Rule 6(e)(6), and that the memorandum was not a grand jury memorandum in that it was not a document generated by the grand jury, nor at any time in the possession, custody or control of the grand jury. The government argued that Rule 6(e) and the underlying policy of grand jury secrecy protect from disclosure only the essence of what takes place in the grand jury room and that because the information was not revealed for the purpose of exposing

what took place before the grand jury, its release did not seriously compromise the secrecy of the grand jury deliberations. The government further stated that the grand jury had not seen the motions or responses to the motions and that the grand jury memorandum publicly filed by the government was not placed before the grand jury.

The government's public disclosure in May, 1986, included the disclosure of the nature and scope of the investigation, the names of persons who were subjects or targets, the name of at least one grand jury witness (along with the fact that he had not yet appeared, but was about to), and that the prospective witness Banks and/or his company, Midland Asphalt Corporation had filed four different grand jury motions, including motions to discover electronic surveillance and motions to compel the government to retain rough interview notes.

B. Disclosure Of The Grand Jury Memorandum Violated Rule 6(e) Of The Federal Rules Of Criminal Procedure

The policy of grand jury secrecy is "older than the nation itself." *Pittsburg Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959). To make public any part of the grand jury proceedings inevitably detracts from its efficacy and restrains grand jurors from acting with the independence required of an accusatory and inquisitorial body. *Id.* at 400. The absence of secrecy has the impact of curtailing the participation of jurors and circumscribing the testimony of witnesses. *Ibid.* Rule 6(e)(6) requires that "Records, orders and subpoenas relating to

grand jury proceedings shall be kept under seal."[3] *See In Re Grand Jury Empanelled March 8, 1984,* 579 F. Supp. 189 (E.D. Tenn. 1983).

Rule 6(e) has been construed broadly to include any information that might reveal matters occurring before the grand jury. The Rule protects from disclosure not only transcripts of grand jury testimony but also information which would reveal the identities of witnesses or the strategy or direction of the investigation. *Fund for Constitutional Government v. National Archives,* 656 F.2d 856, 869 (D.C. Cir. 1981). Rule 6(e) secrecy provisions apply not only to information revealing events that have already transpired, but also to information which may disclose matters that will occur or the focus of the grand jury investigation. *In Re Grand Jury Investigation (Lance),* 610 F.2d 202, 216-217 (5th Cir. 1980); *In Re Grand Jury Investigation of Ven-Fuel,* 441 F. Supp. 1299, 1302-1303 (M.D. Fla. 1977). Grand jury secrecy extends to internal government memoranda which would reflect what transpired before the grand jury. *United States Industries v. United States District Court,* 345 F.2d 18 (9th Cir. 1965).

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[3] Rule 6(e)(6) was adopted after the Comptroller General in 1980 issued a report highly critical of the practice of some district courts of permitting public access to grand jury documents such as subpoenas and immunity orders. The Comptroller General's report concluded that such public access created a serious problem of destroying grand jury secrecy because such materials revealed details of grand jury investigations and identified witnesses, potential targets, and the nature of the investigation. *See* 18 U.S.C.A. (Supp.) Rule 6. Federal Rules of Criminal Procedure, Committee on Rules, 1983 Amendment.

Even witness interviews conducted outside the presence of the grand jury and analyses of such interviews have been held protected by Rule 6(e). *In re: Grand Jury Matter (Garden County Nursing Home),* 697 F.2d 511 (3rd Cir. 1982); *In Re Baggot,* 662 F.2d 1232 (7th Cir. 1981), *aff'd on other grounds,* 463 U.S. 476 (1983).

II. BREACHES OF GRAND JURY SECRECY BY THE GOVERNMENT HAVE THE POTENTIAL TO DESTROY THE INDEPENDENCE OF THE GRAND JURY AND PREJUDICE A DEFENDANT

This Court has previously recognized that one of the most fundamental reasons for grand jury secrecy is to preserve the independence of the grand jury. *Pittsburg Plate Glass Co. v. United States,* 360 U.S. 395, 400 (1939). To the extent that grand jurors learn of breaches of grand jury secrecy, they may be reluctant to question both witnesses and government attorneys either from fear of retaliation by the government or from fear that such questions may become part of the public domain through subsequent breaches of Rule 6(e). Moreover, breaches of grand jury secrecy by the government which pubicly disclose the nature of the investigation and/or the names of grand jury witnesses may result in tampering or importuning of witnesses or grand jurors by third parties such as by competitors of the targets or subjects who have an economic motive to see the targets or subjects indicted so as to weaken or destroy their competitors.[4]

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[4] Such public disclosures may also prejudice a target by causing other agencies of government to commence civil investiga-

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Improper disclosures of Rule 6(e) materials, such as occurred in this case, may prejudice defendants by their impact on other persons who may be persuaded by the disclosures to enter into plea agreements requiring cooperation with the government and may cause such persons to focus on those the government has disclosed as targets in order to improve their own positions or to carry favor with the government. *United States v. Eisenberg,* 711 F.2d 959, 961 (5th Cir. 1983). The creation of adverse preindictment publicity, which often flows from improper Rule 6(e) disclosures, may also inflame the general public and grand jurors, creating improper prejudice. Such adverse preindictment publicity may interfere with the deliberations of the grand jury. *United States v. Eisenberg, Ibid.; In Re Grand Jury Investigation* (*Lance*), 610 F.2d 202 (5th Cir. 1980).

In the case at bar, grand jurors may have learned of the motions for discovery of electronic surveillance and for an order that the government retain copies of rough notes of interviews. Such grand jurors may have concluded that such grand jury motions, along with other unidentified grand jury motions, constituted evidence of consciousness of guilt justifying the indictment of the petitioners Midland Asphalt Corporation and Albert C. Litteer. The government conceded that it did not bring these motions to the attention of the grand jurors as part of the

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tions, to debar such persons from business with the agencies or to cease doing business with such persons, adversely impacting on the subject or target's resources to defend against any subsequent indictment.

grand jury investigation and, therefore, could not have instructed the grand jury to draw no inference from a target's filing of grand jury motions.

In Re Grand Jury Investigation (*Lance*), *Ibid.*, demonstrates the substantial prejudice to a prospective defendant created by unauthorized and improper disclosures of Rule 6(e) material. Such problems recur with frequency in high profile white collar criminal cases, particularly antitrust cases.

III. ONCE A 6(e) VIOLATION IS ESTABLISHED, A DEFENDANT IS ENTITLED TO A HEARING AND DISCOVERY TO ASCERTAIN WHETHER THE VIOLATION CAUSED GRAND JURY BIAS OR LOSS OF INDEPENDENCE

While *Costello v. United States,* 350 U.S. 359, 363 (1956) held that an indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is enough to call for trial of the charge on the merits, such an indictment, returned by a biased grand jury, violates the right not to be held to answer contained in the Fifth Amendment to the United States Constitution. *United States v. Sears, Roebuck & Co.,* 719 F.2d 1386, 1391, n. 7 (9th Cir. 1983), *cert. denied,* 465 U.S. 1079 (1984).

In both *United States v. Sears Roebuck & Co., Id.* at 1392 and *United States v. Kilpatrick,* 821 F.2d 1456, 1473 (10th Cir. 1987), *aff'd sub nom Bank of Nova Scotia v. United States,* 108 S.Ct. 2369 (1988), the Court of Appeals reviewed the grand jury transcripts in order to ascertain whether the alleged government misconduct impacted upon the grand jury's independence and caused it to become biased. In *Kilpatrick;* the Court of Appeals found that the grand jury transcripts showed an active, independent

and questioning grand jury. In *Sears, Roebuck & Co.*, the Court of Appeals reviewed both the transcripts of the grand jury proceedings and the instructions given to the grand jury in finding that the misconduct had not prejudiced the defendants by creating a biased or dependent grand jury. 719 F.2d at 1392-1393.

The petitioners filed pre-trial motions for discovery of the grand jury transcripts and for discovery of the instructions given by the government to the grand jury. These motions were denied. The district court declined petitioners' request to review these materials *in camera*. Where government misconduct has been established and grounds may exist for dismissal of the indictment, disclosure of transcripts of grand jury testimony is warranted. *United States v. Budzanoski*, 462 F.2d 443 (3rd Cir. 1972), *cert. denied*, 409 U.S. 949 (1972).

In *United States v. Kilpatrick*, 821 F.2d 1456 (10th Cir. 1987), *aff'd sub nom Nova Scotia v. United States*, 108 S.Ct. 2369 (1988), this Court determined that dismissal of an indictment for government misconduct is appropriate only if it is established that the violations substantially influenced the grand jury's decision to indict or if there exists grave doubt that the decision to indict was free from the substantial influence of such violations. In *Kilpatrick*, the Court of Appeals found that the grand jury's independence had not been infringed. The Court of Appeals' holding on that issue was not reviewed by this Court, although this Court observed that such an infringement may result in grave doubt as to a violation's effect on the grand jury's decision to indict. 108 S.Ct. 2369 at 2376.

Because Rule 606(b), Federal Rules of Evidence, prohibits inquiry of a grand juror to determine whether or not the independence of the grand jury was compromised, the only method available for assessing the impact of a violation of Rule 6(e) on the grand jury's independence is a review of the grand jury proceedings and the instructions given to the grand jury. In the case at bar, the district court denied petitioners' motions for disclosure of the grand jury transcripts and the instructions given to the grand jury. The district court further declined to review either the transcripts or the instructions *in camera*. Thus, no determination has been made by any court as to whether or not the grand jury's independence was compromised by the Rule 6(e) violation in the case at bar.

IV. DENIAL OF PETITIONERS' MOTIONS TO DISMISS FOR A VIOLATION OF RULE 6(e) IS A FINAL DECISION

When the district court denied petitioners' motions to dismiss the indictment for violation of Rule 6(e), it finally determined that the government had a right to compel the defendants to be held to answer at a criminal trial. Failure to grant petitioners an immediate appeal would result in a permanent irreparable deprivation of the right of any review of whether the violations substantially influenced the grand jury's decision to indict or whether grave doubt exists that the decision to indict was free from the substantial influence of such violations. *See United States v. Kilpatrick*, 821 F.2d 1456 (10th Cir. 1987), *aff'd sub nom Bank of Nova Scotia v. United States*, 108 S.C. 2369 at 2374-75 (1988). If the grand jury's decision was a product of bias caused by the government's undermining of the grand jury's independence, it follows that petitioners can-

not be held to answer at a criminal trial. This right is lost irretrievably if not vindicated prior to the commencement of the criminal trial. For that reason, the district court's judgment constitutes a collateral order and satisfies the prerequisites to appellate jurisdiction under *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949).

In order to constitute a final order under the collateral order doctrine, the order must fully dispose of the question and in no sense leave the matter "open, unfinished or inconclusive." *Id.* at 546. Second, the order may not be a mere step toward final disposition on the merits which would be merged in a final judgment, but rather must resolve an issue collateral to the merits of the case. *Ibid.* Finally, the decision must involve an important right which would be "lost, probably irreparably," if review awaited final judgment. *Ibid.*

This Court has applied the *Cohen* test to appeals from pretrial orders in criminal cases. *Flanagan v. United States*, 465 U.S. 259 (1984); *Helstoski v. Meanor*, 442 U.S. 500 (1979); *Abney v. United States*, 431 U.S. 651 (1977).

A. The Order Fully Disposes Of The Question And Leaves No Matter Open, Unfinished Or Inconclusive

The district court finally determined that no violation of Rule 6(e) occurred. In the absence of appellate review, the trial will proceed. Petitioners will not have an opportunity to renew their objections to the grand jury misconduct or to obtain any discovery, in camera review or hearing with respect to whether the Rule 6(e) violation undermined the grand jury's independence or substan-

tially influenced the grand jury's decision to indict. The trial will be directed solely to the question of whether petitioners committed the offense with which they have been charged and will not address any of the issues that pertain to the district court's order, which is not subject to modification or reconsideration. The district court's order conclusively resolved the issue of whether or not petitioners are required to stand trial on an indictment which followed improper preindictment disclosures of Rule 6(e) materials which may have substantially influenced the grand jury's decision to indict.

This Court has previously determined that the Fifth Amendment requires a valid indictment as a prerequisite to a criminal trial. *Beavers v. Henkel*, 194 U.S. 73, 84 (1904). This Court has also observed that the purpose of the Fifth Amendment requirement of indictment by a grand jury is to limit a citizen's jeopardy to offenses charged by a group of fellow citizens acting independently of a judge or prosecutor. *Stirone v. United States*, 361 U.S. 212, 218 (1960). A decision to hale a man into court is a serious decision and subject to official abuse. *Gaither v. United States*, 413 F.2d 1061, 1066 (D.C. Cir. 1969). In *Gaither*, the Court of Appeals ordered dismissal of an indictment after trial because only the grand jury foreman saw the indictment. An indictment returned by a prejudiced grand jury, which has been deprived of its independence by improper government conduct striking at the heart of the grand jury's power to function, can be no more valid than an indictment unseen and unvoted upon by the grand jury.

Because the Constitution requires a valid indictment as a prerequisite to holding a defendant for a criminal trial

and the purpose of the Fifth Amendment is to limit a citizen's jeopardy to offenses charged by an independent and unbiased grand jury, vindication of that right, no less than the right involved in *Abney*, requires that it be vindicated before a citizen is put in jeopardy by commencement of the criminal trial.

B. The District Court's Order Resolved An Issue Collateral To The Merits Of The Case

Like the double jeopardy claim found appealable in *Abney v. United States*, 431 U.S. at 659, the Rule 6(e) claim presented in this case is collateral to and separable from the issue of whether or not the accused petitioners are guilty of the offense charged. The issue resolved by the district court's order is separable from the petitioners' guilt or innocence. The issue resolved by the district court, whether or not petitioners could be held to answer for an indictment that was the product of a Rule 6(e) violation capable of undermining the independence of the grand jury, is as separate and distinct an issue as the double jeopardy issue in *Abney* and the speech and debate cause issue in *Helstoski*.

C. The District Court's Decision Involves An Important Right Which Will Be Lost Without Immediate Appeal

Rights asserted in connection with motions to dismiss indictments generally do not encompass the right not to be tried. The denial of immediate appellate review postpones, but does not defeat the vindication of the right. This Court has previously recognized important exceptions to the rule of nonfinality for grand jury related orders where the denial of immediate review would render impossible any meaningful review of an individual's claims. *United States v. Ryan*, 402 U.S. 530, 533 (1971); *Perlman v. United States*, 247 U.S. 7 (1918). In *Perlman*, this Court determined that appellate jurisdiction existed over an order denying a petition to enjoin the use before the grand jury of certain exhibits that were in the custody of the court after they had been used in an unrelated lawsuit. This exception was also applied in *In Re Special April, 1977 Grand Jury*, 587 F.2d 889, 891 (7th Cir. 1978) which involved unauthorized disclosures of grand jury material in violation of Rule 6(e). The injury alleged on appeal resulted from the improper disclosures. The Court of Appeals found that denial of immediate review deprived appellant of any meaningful opportunity for judicial review.

In *United States v. McDonald*, 435 U.S. 850, 860 (1978), this Court held that the denial of a motion to dismiss for an alleged violation of the Sixth Amendment right to a speedy trial, was not subject to pre-trial appeal because the right involved did not encompass a right not to be tried at all. This Court distinguished between a right whose remedy would merely require a dismissal of the charges, and the more significant right not to be tried at all. *Id.* at n. 7. In *McDonald*, this Court noted that interlocutory appeals lie only from an asserted right, the legal and practical value of which would be destroyed if it were not vindicated before the trial.

In *Abney v. United States*, 431 U.S. 651 (1977), this Court determined that the *Cohen* collateral order doctrine applied with equal force to both civil and criminal matters. *Abney* at 659, n. 4. The Court observed that *Cohen* involved a right not to face trial at all unless the plaintiff share-

holder posted security for the costs of the litigation. *Id.* at 662, n. 7. The Court in *Abney* found significant the fact that the defendant was contesting the very authority of the government to hale him into court to face trial on the charge against him. *Id.* at 660. Petitioners, by their motion to dismiss for the alleged 6(e) violation, contend that the violation created a dependent grand jury and thus, like the orders found appealable in *Abney*, *Cohen*, and *Helstoski*, contest the very authority of the government to hale them into court to face trial.

While the double jeopardy clause constitutes a guarantee against being twice put to trial for the same offense, *Abney* at 660, the grand jury clause in the Fifth Amendment is a guarantee against being once put in jeopardy on an indictment returned by a grand jury whose decision to indict was substantially influenced by the government's violation of 6(e). *Stirone v. United States*, 361 U.S. 212, 218. This Court observed in *Abney* that the prohibition contained in the Fifth Amendment to the Constitution of the United States was not against being twice punished, but rather against being twice put in jeopardy. *Abney*, 431 U.S. at 661. The same analysis applies to the grand jury clause of the Fifth Amendment which provides that no person may be held to answer unless on the indictment of a grand jury. The purposes of the double jeopardy and indictment provisions of the Fifth Amendment are similar. In *Abney*, this Court determined that the purpose of the double jeopardy provision was to insure that individuals not be required to endure the personal strain, public embarrassment and expense of a second criminal trial, protecting interests wholly unrelated to the propriety of any subsequent conviction. *Abney*, 431 U.S. at 661. In *Beavers v. Henkel*, 194 U.S. 73 (1904), this Court concluded that a valid indictment was a prerequisite to a criminal trial. This Court has also recognized the possibility that even though innocent, a person may be found guilty. *Green v. United States*, 355 U.S. 184, 187-188 (1957).

In *Helstoski v. Meanor*, 442 U.S. 500 (1979), this Court emphasized that there were no further steps that the defendant could have taken other than appeal to avoid the trial that the defendant maintained was barred. This Court found that the speech and debate clause was designed to protect congressmen not only from the consequences of litigation's results, but also from the burden of defending themselves and avoiding the exposure of being questioned for acts done in either chamber of Congress. Several Courts of Appeals have allowed immediate appellate review of pretrial challenges to indictments based on the doctrine of separation of powers. *United States v. Claiborne*, 727 F.2d 842 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984); *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983); *United States v. Myers*, 635 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980).

The Courts of Appeals which have considered the issue of appealability of pre-trial orders declining to dismiss indictments for alleged grand jury abuse have taken three basic approaches to the issue. The Ninth Circuit in *United States v. Benjamin*, 812 F.2d 548 (9th Cir. 1987) [involving a Rule 6(e) violation] and in *United States v. Dederich*, 825 F.2d 1317 (9th Cir. 1987) [involving alleged prosecutorial misconduct] permitted pre-trial appellate review, concluding that this Court's decision in *Mechanik* would foreclose effective post-conviction review because a conviction would determine the existence of probable cause and render any grand jury errors affecting the charging

decision harmless. *Benjamin* at 552. The Ninth Circuit reached this conclusion even though it recognized that this Court in *Mechanik* expressed no opinion as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought to the attention of the trial court before the commencement of trial. The Ninth Circuit observed that two other circuits had applied *Mechanik* broadly in post-conviction review of alleged grand jury abuse. *Benjamin* at 552-553. In both *United States v. Thomas*, 788 F.2d 1250, 1254 (7th Cir. 1986) [involving a claim of alleged prosecutorial misconduct before the grand jury] and *Porter v. Wainwright*, 805 F.2d 930, 941-42 (11th Cir. 1986) [involving a claim of grand juror bias] convictions were held to render harmless any alleged prosecutorial misconduct affecting the grand jury's charging decision.

The Tenth Circuit in *United States v. Taylor*, 798 F.2d 1337, 1339-40 (10th Cir. 1986) [a pre-trial appeal from a refusal to dismiss an indictment for an alleged invasion of the defense camp by the prosecutors], held that the grand jury irregularities involved in that case could be effectively reviewed after final judgment notwithstanding *Mechanik*. The Tenth Circuit held that *Mechanik* applied only to technical violations which could have affected the grand jury's determination of probable cause but did not apply to other acts which have an effect upon the fundamental fairness of the criminal proceedings. The Tenth Circuit determined that the latter were properly preserved for post-conviction appeal and would not be rendered harmless by a conviction.

The First Circuit in *United States v. LaRouche Campaign*, 829 F.2d 250, 254 (1st Cir. 1987) [involving a pre-trial appeal of an order declining to dismiss an indictment

for various alleged grand jury abuses, including an alleged violation of Rule 6(e)] and the Seventh Circuit in *United States v. Daniels*, 848 F.2d 758 (7th Cir. 1988) [involving a claim made after the acceptance of guilty pleas that the indictment was returned after the term of the grand jury had ended] suggested that *Mechanik's* harmless error analysis was grounded in the conclusion that such errors are too insignificant to call for correction. Extending that logic, both the Seventh Circuit and the First Circuit further concluded that such errors, if too insignificant to call for post-conviction correction, are too insignificant to justify pre-trial appellate review. The First Circuit further suggested that contempt or disciplinary action were appropriate remedies for prosecutorial misconduct in the indicting process.[5]

Taylor, Daniels and *LaRouche Campaign* were decided prior to this Court's opinion in *Bank of Nova Scotia*. It is unlikely that the error in *Daniels* could have affected the grand jury's charging decision. For that reason, *Daniels* did not involve a right not to be tried at all. Similar allegations of alleged prosecutorial misconduct, such as the failure to present exculpatory evidence to the grand jury, do not raise a right of a defendant not to be tried. A right not to be tried at all can arise only from prosecutorial misconduct (such as the Rule 6(e) violation in this case) having the potential to compromise the grand jury's independence. The violation must be inextricably inter-

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[5] This Court has previously observed that Rule 6(e) violations are difficult to detect and prove. *United States v. Sells Engineering*, 463 U.S. 418 at 432-433 (1983). That fact makes it more likely that the government will take such risks if it perceives a tactical advantage to be gained by the violation.

twined with the grand jury's ability to function as a shield between the government and a potential accused. It is only in these limited circumstances that the right at issue, the right not to be tried at all, becomes important enough to warrant pre-trial appellate review. The First Circuit did not have the benefit of this Court's opinion in *Bank of Nova Scotia* nor did it recognize that alternative remedies such as contempt or disciplinary proceedings cannot restore the grand jury's independence once it has been compromised.

The focus of inquiry must be on both the potential and actual impact of the violation on the grand jury's decision to indict. If there is no potential effect on the grand jury's decision to indict, the right at issue is a right other than the right not to be tried. If the violation has the potential to compromise the grand jury's independence, then an inquiry must be made into the actual effect of the violation on the grand jury's independence. Only in those circumstances does the right at issue involve the right not to be held to answer at all. Only in those narrow circumstances is the right at issue significant enough to justify pre-trial appellate review. Such pre-trial appellate review is appropriate only for government misconduct so totally intertwined with the grand jury's ability to operate as an independent body of citizens that the effect is likely to impact on the determination of probable cause. The secrecy surrounding the grand jury proceedings is so vitally important to the grand jury's ability to carry out its constitutional function of acting as a shield between the government and the potential accused that violations of the rule of secrecy which compromise a grand jury's independence work a forfeiture of the right not to be held to answer

except on a finding of probable cause by one's fellow citizens.

V. THE GRAND JURY'S POWER AS ACCUSER AND AS PROTECTOR OF THE LIBERTY OF CITIZENS IS NOT DIMINISHED BY APPELLATE REVIEW TO DETERMINE WHETHER GOVERNMENT MISCONDUCT COMPROMISED ITS INDEPENDENCE

The grand jury evolved as a protector of citizens against arbitrary and oppressive government action in order to prohibit the bringing of unfounded criminal prosecutions. *United States v. Calandra,* 414 U.S. 338, 343 (1974). The grand jury's role includes a determination of whether a charge is founded upon reason or was dictated by an intimidating power, by malice or by personal ill will. *Wood v. Georgia,* 370 U.S. 375, 390 (1962).

The public interest in the grand jury's investigative and charging function is substantially protected by the presumption of regularity which attaches to grand jury proceedings. *Hamling v. United States,* 418 U.S. 87, 139 n. 23 (1974). The public interest is further protected by the fact that the grand jury conducts its investigations *ex parte* and receives evidence only from the government prosecutor. The grand jury is free to consider hearsay or other incompetent evidence, as well as evidence illegally obtained by the government. *United States v. Calandra,* 414 U.S. 338 (1974); *Costello v. United States,* 350 U.S. 359 (1906). Thus, the competency and adequacy of the evidence before the grand jury is not open to judicial review. *United States v. Calandra,* 414 U.S. at 345; *Costello,* 350 U.S. at 363. Moreover, an indictment may be returned if

as few as twelve grand jurors concur. In the event that a grand jury declines to charge a suspect, the government may re-present the case and obtain an indictment from a subsequent grand jury. *Ex Parte United States*, 287 U.S. 241, 250-251 (1932).

Government misconduct, such as the unwarranted disclosure of Rule 6(e) information, compromises the integrity of the grand jury by sapping its independence. Dismissal is likely to have a meaningful effect on the disposition of the case because a new grand jury, untainted by the disclosures, may refuse to indict. To the extent that such disclosures did not impact adversely on the first grand jury's independence, it is likely that a second grand jury would re-indict.

A violation of Rule 6(e) by the government may be intentional and deliberate as part of a strategy designed to further its investigative aims. For example, the government may believe that a particular subject or target is leaning toward cooperating with the government, which cooperation is necessary to the government in order to expand its investigation or strengthen its case against other potential targets or subjects. Selective disclosure of certain information protected by Rule 6(e) may be just what is needed by the government in order to induce the potential cooperator to make his decision to cooperate with the government and agree to testify against other subjects or targets.[6]

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[6] After the Rule 6(e) disclosures in the case at bar, Leroy Krantz, named by the government as a co-conspirator with petitioners in the offense charged, caused his company to enter

(Continued on following page)

Discrete but improper disclosures of Rule 6(e) information may also cause a target or subject to cooperate with the government out of fear that continuing publicity would injure his reputation more than a plea agreement or a plea agreement for his company and immunity for himself. Such improper disclosures may also cause state or other public agencies to debar or otherwise refuse to do business with such subjects or targets, placing economic pressure on those subjects or targets to resolve their problems with the grand jury. The government should not be allowed to make strategic use of Rule 6(e) violations as a tactic to further its interests while uniformly denying defendants access to such materials on the grounds that the materials are protected by Rule 6(e). To permit the government to take such one-sided views of Rule 6(e) materials is to concede that the end justifies the means. That proposition can never be tolerated in a civilization governed by law, and can only open the door to governmental misconduct, jeopardizing the fundamental concepts of liberty on which this nation was founded.

A requirement imposed on the government of seeking a re-indictment where prejudice has impaired the first

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(Continued from previous page)

into a plea agreement with the government which was filed December 3, 1986. That plea agreement required cooperation by Krantz with the government. Krantz commenced cooperating with the government and testified before the grand jury prior to the date on which petitioners were indicted.

grand jury's independence will deter prosecutors from unauthorized disclosures of Rule 6(e) information, as well as other types of prosecutorial misconduct.[7]

This Court has observed that the Constitution cannot tolerate the transformation of the grand jury into an instrument of oppression. *United States v. Dionisio,* 410 U.S. 1 at 12 (1972).

There are strong public policy reasons for enforcing Rule 6(e). Rule 6(e)'s codification of the historic practice of grand jury secrecy is inextricably intertwined with the grand jury's ability to investigate crime and determine the existence of probable cause. *United States v. Proctor & Gamble,* 356 U.S. 677, 681 (1958) (footnote omitted). Grand jury secrecy is equally important for the protection of the innocent as for the pursuit of the guilty. *United States v. Johnson,* 319 U.S. 503, 510-512 (1943).

Grand jury secrecy encourages witnesses to make full and complete disclosures to the grand jury. *Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 211, 218-219 (1979) (footnotes and citation omitted). Leaks of protected grand jury information impair the ability of the grand jury to function by discouraging witnesses from making full and untramelled disclosures of facts necessary to a determination of the existence of probable cause. Unauthorized and

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[7] In the case at bar, the government misrepresented the improper 6(e) disclosure to be "a letter containing that commitment." Instead, the attachment was not a letter but the government's response to grand jury motions filed by the petitioner Midland Asphalt Corporation and its officer Bradford Banks. Such a misrepresentation, signed by the very prosecutor who signed the grand jury memorandum, could not have been inadvertent and could only have been for the purpose of attempting to conceal the violation of Rule 6(e).

improper leaks of grand jury materials also discourage grand jurors from independently seeking the facts by asking relevant questions. Such leaks also discourage grand jurors from frank and open deliberations out of fear that such discussions might be leaked by the government to third parties.

A defendant has the right to have charges against him heard by an unbiased grand jury, *Costello v. United States,* 350 U.S. 359 (1956); and by a grand jury which is capable of exercising independent judgment. *Cassell v. State of Texas,* 339 U.S. 282 (1950); *United States v. Wright,* 667 F.2d 793, 796 (9th Cir. 1982); *United States v. Hogan,* 712 F.2d 757 (2d Cir. 1983).

Because a defendant may not challenge the degree or type of evidence which the government presents to the grand jury, *Costello v. United States,* 350 U.S. 359 (1956), the grand jury's role as a shield between the government and the prospective accused is dependent, for its protection, solely on the procedural safeguards, such as the rule of secrecy incorporated in Rule 6(e).

Pre-trial appellate review of district court orders involving Rule 6(e) violations does not diminish the power of the grand jury. Given the growing power of the government prosecutors over the grand jury, eliminating the effect of government misconduct which compromises the independence of the grand jury can only strengthen the grand jury's power. The grand jury derives much of its power from the secrecy which has surrounded its proceedings. Such secrecy is necessary for the grand jury to obtain full and frank disclosures from witnesses and to insure free and open deliberations by the grand jurors.

Breaches of the secrecy surrounding the grand jury proceedings diminish the grand jury's power to obtain evidence, discuss the significance of the evidence and determine the existence of probable cause. Because the grand jury's power is diminished by the government's breach of Rule 6(e), it must of necessity rely more heavily on the government. It is ironic that the government, through selective breaches of grand jury secrecy, can obtain an unfair tactical advantage over a potential target or subject and at the same time increase its power over the grand jury.

It is also ironic that the government, which utilizes the grand jury as an investigative tool, has within its power the ability to avoid the issue raised in this appeal by simple adherence to the procedural rules, including the rule of secrecy. The government can avoid the prospect of a dismissal by simply choosing to re-present the case to a grand jury selected in such a way as to insure that the grand jury is untainted by the government's Rule 6(e) violation.

Both the grand jury's power and its historic function as a shield between the government and a potential accused are based, in large part, upon the secrecy surrounding the grand jury's proceedings. Selective improper public disclosures of grand jury information by the government serve not only to prejudice an accused but also to diminish the power and integrity of the grand jury.

A violation of the rule of secrecy capable of compromising the grand jury's independence, and thus its ability to act as a shield between the government and a prospective accused, requires that a district court decision declining to dismiss an indictment for the preindictment

release of information protected by Rule 6(e) be subject to appellate review prior to the commencement of the criminal trial.

VI. AN ANALYSIS OF SOCIETAL COSTS SUPPORTS PRE-TRIAL APPELLATE REVIEW OF ORDERS DECLINING TO DISMISS INDICTMENTS FOR VIOLATIONS OF RULE 6(e)

Neither the societal costs of a prosecution, nor the costs to the accused, justify permitting a criminal trial to proceed upon an indictment obtained by the government in violation of the structural protections of the grand jury's independence when that indictment is the product of a grand jury whose independence has been compromised by the violation of Rule 6(e).

The government has recognized that the societal costs of post-conviction relief are greater than the societal costs imposed by a pre-trial remedy. *See* Brief for the United States, p. 31, *United States v. Mechanik,* 475 U.S. 66 (1986). Awaiting post conviction relief would require not only repeating a trial on the merits, but also repeating the presentation of the government's case to the grand jury. The significantly greater passage of time required after an initial trial would result in the erosion of memories and problems in locating witnesses and records. Re-indictment and retrial after a conviction also impose an undue burden on judicial resources.

A pretrial disposition, in those limited circumstances where grand jury matters have been improperly disclosed prior to the return of the indictment and thus may have denied petitioners their right to an independent and unbiased

grand jury, does not involve the significant societal costs inherent in delaying the determination of such an issue until after an initial trial.[8]

Nor does a pretrial disposition by immediate appellate review prejudice the government's case against an accused. Under those circumstances, it is likely that the district court would permit the government to preserve testimony through depositions under Rule 15, Federal Rules of Criminal Procedure. Nor is the delay involved in such an appeal likely to be lengthy. As this Court suggested in *Abney v. United States,* 431 U.S. at 660, either expedited or summary procedures could be utilized in order to minimize the delay between such a pretrial determination and the criminal trial. Because there are alternate means of preserving evidence, and the delay between pretrial appeal and an eventual trial is likely to be shorter then the delay between post-conviction appeal and a second trial, the government is likely to suffer less prejudice through an immediate appeal than it would were a defendant forced to wait for post-conviction relief. It is far easier for the government to re-present a case to the grand jury at the time the issue is raised pre-trial than to re-present a case after post-conviction reversal.

VII. ALTERNATIVE REMEDIES ARE ILLUSORY

Rule 6(e)(2) provides that a knowing violation of the Rule may be punished by contempt. Contempt is an illusory remedy for a number of reasons. First, a finding of

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[8] In the case at bar, the government has noticed the video taped deposition of one of its principal witnesses, Leroy Krantz, in order to preserve his testimony for an eventual trial.

contempt does not eliminate the prejudice a prospective accused suffers, nor does it undo the damage done to the independence of the grand jury. Second, the difficulty of determining the person or persons responsible for the disclosures may be insurmountable. *See In Re Grand Jury Investigation (Lance),* 610 F.2d 959 (5th Cir. 1983). Third, a defendant is at the mercy of the prosecutor for disclosures pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963) and the timing of disclosures under the Jencks Act, 18 U.S.C. § 3500 as well as for trial cooperation and for a sentencing recommendation. Attempting to hold a prosecutor in contempt is likely to punish a defendant more heavily than a district court is likely to punish the prosecutor involved in a Rule 6(e) violation. District courts are also hesitant to hold prosecutors, upon whom they have to depend for day to day cooperation, in contempt. *Lance, Ibid.*[9]

Similarly, a district court's sanctioning of the offending prosecutor in an opinion or the reporting of prosecutorial conduct to the Department of Justice cannot undo prejudice to the defendant or eliminate the effect upon the grand jury's independence. Petitioners are unaware of any investigation by the Department of Justice of the prosecutors' conduct in the case at bar.

Thus, the remedies generally suggested by the government have been and remain ineffectual in deterring prosecutors from violations of 6(e) and other similar types of misconduct where the prosecutor perceives some advantage in such conduct.

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[9] It is uncertain whether contempt for a 6(e) violation is civil or criminal, *See Lance, Ibid.*

VIII. THIS COURT'S DECISIONS IN MECHANIK AND BANK OF NOVA SCOTIA REQUIRE THAT ERRORS WHICH IMPACT THE GRAND JURY'S CHARGING DECISION BE FINALLY DETERMINED PRIOR TO TRIAL

United States v. Mechanik, 475 U.S. 66 (1986), involved a post conviction challenge to a violation of Rule 6(d) which occurred during the grand jury proceeding. This Court concluded that because the challenge to the grand jury's proceedings was not raised prior to the trial, the subsequent finding of guilt by the petit jury made it unnecessary to redetermine whether there was probable cause to believe the defendants committed a crime, *Id.* at 73. The Court found the societal costs of requiring such a redetermination unjustified. *Id.* at 72. In *Mechanik*, this Court observed that Rule 6(d) was designed to protect an accused against the danger of being required to defend against a charge for which there is no probable cause to believe him guilty. *Id.* at 70. This Court also recognized that violations of Rule 6(d) had the theoretical potential to affect the grand jury's determination of whether to indict. *Ibid.* This Court also appeared to accept the conclusion of both the district court and Court of Appeals in *Mechanik* that Rule 6(d) was designed in part to insure that grand jurors are not subject to undue influence as a result of the presence of an unauthorized person. Because the Rule 6(d) error was not brought to the attention of the district court until after the criminal trial had commenced and jeopardy had already attached, the only right of which the defendant was deprived, i.e. the right not to be held to answer except upon the indictment of an unbiased and independent grand jury, could not be vin-

dicated by reversal. The petit jury's verdict had supplied not only the finding of probable cause, but also a determination that the defendant was guilty beyond a reasonable doubt.

This Court found in *Mechanik* that the defendant, after verdict, could not be restored to the position which he would have been in had the indictment been dismissed before trial. *Id.* at 71. This Court observed that the defendant had already suffered whatever inconvenience, expense and opprobrium that a proper indictment may have spared him. *Ibid.* Observing that "the moving finger writes; and, having writ, moves on," this Court concluded that reversal of defendant's conviction could not restore whatever benefit might have accrued to him from a trial on an indictment returned in conformity with Rule 6(d). *Ibid.* Significantly, this Court assumed that the district court would have been justified in dismissing portions of the indictment had there been actual prejudice and had the matter been called to its attention before commencement of the trial. *Id.* at 69.

In the case at bar, the Rule 6(e) violation was called to the attention of the district court long prior to the commencement of the trial. The district court declined to find a Rule 6(e) violation and, therefore, failed to give petitioners the opportunity to show prejudice. The district court conducted no *in camera* review of the grand jury transcripts in order to determine whether the petitioners were prejudiced by the improper disclosures of the Rule 6(e) material. To the extent the grand jury's independence was compromised by the improper disclosures, creating bias, petitioners will be compelled to stand trial

upon an indictment which is invalid. In that event, the petitioners' constitutional guarantee contained in the Fifth Amendment has been violated. That right can be vindicated only by an appeal prior to the commencement of a criminal trial. It is a right no less significant than the rights at issue in *Abney* and *Helstoski*.

In *Bank of Nova Scotia v. United States*, 108 S.Ct. 2369 (1988), this Court focused upon the impact on the grand jury's decision to indict in the context of a motion to dismiss, filed prior to the trial, for various alleged procedural violations, including Rule 6(e).

When an alleged Rule 6(e) error is called to the attention of the district court prior to the time jeopardy attaches by the commencement of the criminal trial, the focus of the district court's examination for determining prejudice must be on the grand jury's charging decision, because there is no petit jury verdict. *United States v. Mechanik*, 475 U.S. 66 (1986) (Justice O'Connor concurring); *Bank of Nova Scotia v. United States*, 108 S.Ct. 2369 at 2378 (1988).

In *Bank of Nova Scotia* this Court adopted the standard of prejudice suggested by Justice O'Connor in her concurring opinion in *United States v. Mechanik*, 475 U.S. 66 (1986). The Court stated that this standard was to be applied in those cases in which a court is asked to dismiss an indictment prior to the conclusion of the trial. In *Bank of Nova Scotia*, this Court did not determine whether the grand jury's independence was compromised by the alleged violations. The Court of Appeals had concluded that the defendants were not prejudiced by the alleged errors. In *Bank of Nova Scotia*, this Court determined

that a district court may not dismiss an indictment for prosecutorial misconduct unless the misconduct prejudices the defendant and that the standard of prejudice focuses upon the effect of the violation on the grand jury's decision to indict.

Implicit in this Court's analysis in *Bank of Nova Scotia* is that once prosecutorial misconduct in the grand jury investigation has been raised the district court must review the grand jury record to determine whether such misconduct substantially influenced the grand jury's decision to indict or if there is grave doubt that the decision to indict was free from the substantial influence of such violation. That analysis requires, at the very least, a review of the transcript of the grand jury proceedings as was conducted by the Court of Appeals in *Kilpatrick*.

As Justice O'Connor recognized in her concurring opinion in *Mechanik*, an analysis of the impact of the alleged violation on the grand jury's decision to indict does not impose unwarranted costs on the criminal justice system because the government may avoid such an analysis by adhering to the Rules of Criminal Procedure and can remedy any violation by obtaining a superseding indictment so as to avoid the risk of subsequent dismissals. Moreover, dismissal would result only in those limited and unusual circumstances in which the violation gives rise to a grave doubt as to whether the violation had an effect on the charging decision.

Petitioners' right to pre-trial appellate review is supported by this Court's decision in *Vasquez v. Hillery*, 474 U.S. 254 (1986), involving racial discrimination in the selection of grand jurors. The petit jury's verdict in

that case did not cause the error in the method of selecting grand jurors to be harmless because prejudice in the grand jury's charging decision was presumed and the defendant had an absolute right not to be required to stand trial on an indictment returned by a biased grand jury. The societal costs of appellate review to preserve the right not to be held to answer except upon a valid indictment pale in comparison to the value of the right and to the societal costs which would be incurred if such review did not take place until after a conviction.

Just as discrimination on the basis of race in the selection of grand jurors strikes at the fundamental values of our judicial system and our society as a whole, the right not to be held to answer by being required to stand trial in a criminal case upon an indictment returned by a biased grand jury whose independence has been compromised, strikes directly at the fundamental values of our judicial system and our society. The important role of an independent grand jury in preserving a free and open society is illustrated by the efforts of the Crown in 1681 to indict the Earl of Shaftsbury for treason. The secrecy of grand jury proceedings has been deemed critical in preserving the independence of the grand jury, and in protecting grand jurors from being required to divulge to anyone, including the courts, the evidence or reasons upon which they acted or refused to act. It was principally the grand jury's role as a shield between arbitrary government action and the citizen that led to the adoption of the Fifth Amendment to our Constitution guaranteeing that "no person shall be held to answer for a capital, or otherwise infamous crime except on presentment or indictment

of a grand jury." It is for this reason that the constitution refers only to the grand jury's protective function even though its historic dual role has included its investigatory, inquisitory and accusatory roles.

CONCLUSION

The order of the Court of Appeals should be reversed and the case remanded for a determination of whether petitioners were prejudiced by the government's violation of Rule 6(e).

Respectfully submitted,

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RESPONDENT'S

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OCTOBER TERM, 1988

MIDLAND ASPHALT CORPORATION
AND ALBERT C. LITTEER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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47 pp

QUESTION PRESENTED

Whether an order denying a motion to dismiss an indictment for an alleged violation of Fed. R. Crim. P. 6(e) may be immediately appealed, prior to the entry of a final judgment of conviction and sentence, under the collateral order doctrine.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1905

MIDLAND ASPHALT CORPORATION
AND ALBERT C. LITTEER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-17) is reported at 840 F.2d 1040. The order of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 1-2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1988. A petition for rehearing was denied on March 25, 1988 (Pet. App. 18). The petition for a writ of certiorari was filed on May 20, 1988, and was granted on June 27, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Midland Asphalt Corporation (Midland) is engaged in the sale of liquid bituminous material. Peti-

tioner Albert C. Litteer is Midland's president and part owner. On January 23, 1987, a federal grand jury in the Western District of New York returned an indictment charging petitioners with conspiring to allocate contracts and rig bids for the sale of liquid bituminous material to the State of New York and to certain counties in western New York, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. 5.

Petitioners thereafter moved to dismiss the indictment on several grounds. Among their claims was the contention that the government had violated Fed. R. Crim. P. 6(e) by disclosing details of the grand jury investigation to the public. Petitioners claimed that the government had violated the Rule by filing with the court, in connection with a separate case, a legal memorandum that revealed matters occuring before the grand jury in the present case. Pet. App. 5; Pet. 4.

Petitioners' Rule 6(e) allegations arose from a parallel civil action commenced by petitioner Midland and another company on May 15, 1985. *In re Grand Jury Subpoenas to Midland Asphalt Corp. and Krantz Asphalt Co.*, Civ. 85-633E (W.D.N.Y. Feb. 12, 1985). In that action, Midland sought a court order requiring the government to reimburse it for the costs of complying with certain grand jury subpoenas duces tecum issued during the ongoing bid-rigging investigation. In Midland's motion papers, the company's Secretary, Bradford H. Banks, stated that Midland had been served with a grand jury subpoena "in connection with an industry-wide investigation being conducted by the Antitrust Division of the United States Department of Justice throughout the Western District of New York" (Banks Apr. 26, 1985, Affidavit para. 2).[1]

[1] A copy of one of the grand jury subpoenas was attached to the Banks Affidavit. Midland also submitted a legal memorandum in support of its motion, which stated, in part, that Midland had been served with "sweeping, twenty-one page Grand Jury subpoenas seeking virtually all of [its] records * * * regarding bids on highway, airport runway and road construction projects in Western New York over more than a seven year period" (Memorandum in Support of Order to Show Cause at 1).

Banks asserted that compliance with the subpoenas would prove "extremely onerous," and he therefore requested $18,000 "to cover the expenses of complying with the subpoenas" (*id.* para. 8). Midland's motion was not submitted under seal. The district court denied Midland's motion on June 26, 1985.

On July 18, 1985, Midland filed a second motion in its civil action. This time, the company sought to require the government to retain its rough and final notes of witness interviews and to compel the government to affirm or deny any interception of wire or oral communications of Bradford Banks. In its motion papers, Midland stated, among other things, that "Bradford Banks has been served with a subpoena and is presently scheduled to appear before the grand jury on July 23, 1985." Motion at 2. The second motion was likewise not made under seal.[2] The government thereafter filed a responding memorandum, in which it "agree[d] to retain any rough notes and final reports which it prepares of any interviews conducted by Antitrust Division attorneys or other government personnel in connection with this investigation of persons presently or formerly engaged in the road paving business in the State of New York." July 31, 1985, Memorandum at 1.

On April 14, 1986, the defendants in a separate criminal case arising from bid-rigging activities in the Western Dis-

[2] On October 2, 1985, at an open hearing on the motion, counsel for Midland again represented that Banks was "a grand jury witness" (Tr. 3).

trict of New York made a similar motion to require the government to preserve its rough interview notes. *United States* v. *Allegany Bitumens, Inc.*, Crim. No. 86-59C. In response, the government filed a legal memorandum, stating in pertinent part that it had "already made a representation to the Court that * * * it will preserve its rough notes." May 5, 1986, Memorandum at 11. The government attached to that memorandum a copy of the memorandum that it had submitted in Midland's civil action, in which the government had made the original commitment to preserve its interview notes.

In moving to dismiss the indictment in the present case, petitioners claimed that by attaching the earlier memorandum to the responsive papers in the *Allegany Bitumens* case the prosecutor had disclosed "matters occurring before the grand jury," in violation of Fed. R. Crim. P. 6(e). In particular, petitioners contended that a statement on page 1 of the July 31, 1985, memorandum—referring to an "investigation of persons presently or formerly engaged in the road paving business in the State of New York"—revealed "the nature of the investigation being conducted by the grand jury." Petitioners also identified statements on pages 3 and 5 of the memorandum that purportedly revealed that Midland's Secretary, Bradford Banks, had been subpoenaed to testify before the grand jury. Memorandum in Support of Motion to Dismiss at 3 (Cr. No. 87-18C).

2. On December 18, 1987, the district court denied petitioners' motion to dismiss the indictment under Rule 6(e) (Pet. App. 1-2). The court found (*id.* at 2) that the government had not revealed matters occurring before the grand jury when it filed its legal memorandum. It explained (*ibid.*) that petitioners had filed no motion to seal

the record in the civil action and that Midland had itself revealed at the October 2, 1985 hearing the fact that Bradford Banks had been subpoenaed as a grand jury witness.

3. The court of appeals dismissed petitioners' appeal from the district court's orders (Pet. App. 3-17). The court held (*id.* at 10-17) that the district court's December 18 order was not appealable prior to a final judgment. It rejected petitioners' contention that, in light of this Court's decision in *United States* v. *Mechanik*, 475 U.S. 66 (1986), an order denying a motion to dismiss an indictment under Rule 6(e) is "effectively unreviewable on appeal from a final judgment" (Pet. App. 6) and is therefore immediately appealable under the "collateral order" doctrine recognized by this Court in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The court explained (Pet. App. 16) that whereas the Rule 6(d) violation in *Mechanik* affected only the grand jury's capacity to make a fair determination of probable cause, Rule 6(e) serves the "very different function" of "protect[ing] society's interest in keeping secret the identity of grand jury witnesses and persons under investigation" and "safeguard[ing] the interests of society and of the defendant in receiving a fair trial." Accordingly, the court reasoned, "unlike a violation of Rule 6(d), a violation of Rule 6(e) is not rendered harmless simply because the defendant is convicted" (*ibid.*), and thus petitioners would not be foreclosed from pressing their Rule 6(e) claim after a verdict of conviction. "By the same token," the court concluded, "a Rule 6(e) challenge does not qualify for immediate review under the collateral order doctrine" (*id.* at 16-17 (footnote omitted)).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States* v. *Mechanik*, 475 U.S. 66 (1986), this Court held that a violation of Fed. R. Crim. P. 6(d)—in that case, the simultaneous presence and testimony of two government witnesses before the grand jury—is rendered harmless beyond a reasonable doubt by a subsequent conviction by the petit jury. The Court assumed (*Mechanik*, 475 U.S. at 69) that the government had violated Rule 6(d), and it acknowledged that such a violation has "the theoretical potential to affect the grand jury's determination whether to indict" (*id.* at 70). The Court explained, however, that "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt" (*ibid.*). The Court accordingly concluded (*ibid.* (footnote omitted)) that "[m]easured by the petit jury's verdict, * * * any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt."

The courts of appeals have since divided on the question whether an order denying a motion to dismiss an indictment for a violation of Fed. R. Crim. P. 6 is, in light of *Mechanik*, "effectively unreviewable" after a conviction and, for that reason, subject to interlocutory review under the collateral order doctrine announced in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The Tenth Circuit in *United States* v. *Taylor*, 798 F.2d 1337 (1986), and the court below have held that certain serious grand jury errors may be raised after conviction notwithstanding *Mechanik*. Accordingly, they have reasoned, there is no need to permit such claims to be the subject of pretrial appeals. In contrast, the Ninth Circuit in *United States* v. *Benjamin*, 812 F.2d 548 (1987), and *United*

States v. *Dederich*, 825 F.2d 1317 (1987), has held that *Mechanik* bars any post-conviction appeal challenging errors committed in connection with a grand jury investigation; in the absence of a right to post-conviction review, the court has held, a defendant is entitled to raise such claims on appeal before trial. Finally, the First Circuit in *United States* v. *LaRouche Campaign*, 829 F.2d 250 (1987), and the Seventh Circuit in *United States* v. *Daniels*, 848 F.2d 758 (1988), have stated that the denial of a motion to dismiss on grounds of grand jury error may not be reviewed before trial, even if the claim could not be raised after trial because of *Mechanik*.

A. We agree with the First and Seventh Circuits. Even though a violation of Fed. R. Crim. P. 6(e) is rendered harmless by a conviction after trial, the collateral order doctrine does not entitle a defendant to interlocutory review of an order denying a Rule 6(e) motion to dismiss an indictment.

The collateral order doctrine is a "narrow exception" to the final judgment rule. In order for the doctrine to apply, a trial court order must (1) "conclusively determine the disputed question"; (2) "resolve an important issue completely separate from the merits of the action"; and (3) "be effectively unreviewable on appeal from a final judgment." *Flanagan* v. *United States*, 465 U.S. 259, 265 (1984) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted)). Petitioners' Rule 6(e) claim does not satisfy either the second or third requirement. It does not follow from the fact that a Rule 6(e) error will become harmless after conviction that it is "effectively unreviewable" on appeal, in the sense required by the Court's cases. In this setting, as in others, the fact that a claim will be governed by the harmless error standard on appeal, and that it may be difficult for an appellant to

prevail on that claim at that time, does not entitle the appellant to interlocutory review. To the contrary, in criminal cases a claim is ordinarily subject to interlocutory appeal only when it affords the defendant a "right not to be tried" before appellate review takes place. Petitioners enjoy no such right with respect to their Rule 6(e) motion to dismiss. Nor does petitioners' motion involve "an important issue completely separate from the merits of the action." To the contrary, because a violation of Rule 6(e) is rendered harmless by, and thus merges into, a final judgment of conviction, a Rule 6(e) motion to dismiss is not collateral to the determination of a defendant's guilt or innocence at trial.

B. The costs of expanding the collateral order doctrine to cover petitioners' claim greatly exceed the benefits. Interlocutory review means delay, and delay in criminal cases imposes substantial and unwarranted costs. On the other hand, there is little reason to believe that creating a novel right to an immediate appeal in Rule 6(e) cases will enable any significant number of erroneously denied claims to be corrected by an appellate court.

ARGUMENT

AN ORDER DENYING A MOTION TO DISMISS AN INDICTMENT UNDER FED. R. CRIM. P. 6(e) IS NOT SUBJECT TO INTERLOCUTORY REVIEW UNDER THE COLLATERAL ORDER DOCTRINE

If petitioners are convicted at trial in this case, their Rule 6(e) claim will be subject on appeal to the harmless error rule in *United States* v. *Mechanik*, 475 U.S. 66 (1986). The court below suggested otherwise, reasoning that Rule 6(e) claims—unlike the Rule 6(d) claim in *Mechanik*—serve public policies in addition to ensuring the accuracy of the grand jury's fact-finding, and that Rule 6(e) claims therefore would not be rendered harmless by a conviction. More recently, however, the Second Circuit has taken a different view, applying the rule in *Mechanik* to a pre-trial publicity claim under Rule 6(e). *United States* v. *Friedman*, 854 F.2d 535 (2d Cir. 1988). In our view, the court of appeals' more recent reading of *Mechanik* is correct: there is no basis for confining the logic of that case to violations of Rule 6(d). Accord, *e.g.*, *United States* v. *Fountain*, 840 F.2d 509, 514-515 (7th Cir. 1988); *United States* v. *Hintzman*, 806 F.2d 840, 843 (8th Cir. 1986). Moreover, this Court's decision in *Bank of Nova Scotia* v. *United States*, No. 87-578 (Apr. 27, 1988), makes clear that, notwithstanding the systemic policies promoted by Rule 6(e), a court of appeals may order the dismissal of an indictment "only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations" (*Nova Scotia*, slip op. 5, quoting *Mechanik*, 475 U.S. at 78 (O'Connor, J., concurring)). Any such claim of prejudice in the grand jury's charging decision would, of course, be rendered harmless after a conviction.

We therefore take as our premise in this case that on appeal from a conviction petitioners' Rule 6(e) claim would be subject to the harmless error rule in *Mechanik*. Nevertheless, as we show below, the collateral order doctrine does not entitle petitioners to interlocutory review.

A. An Order Denying a Rule 6(e) Motion To Dismiss An Indictment Is Not Subject To Interlocutory Review Under The Collateral Order Doctrine

1. The collateral order doctrine is a narrow exception to the final-judgment rule

a. Under 28 U.S.C. 1291, the courts of appeals have jurisdiction over appeals "from all final decisions of the district courts * * * except where a direct review may be had in the Supreme Court." "Finality as a condition of re-

view," the Court has often explained, "is an historic characteristic of federal appellate procedure." *Cobbledick* v. *United States*, 309 U.S. 323, 324 (1940). See also, *e.g.*, *Flanagan* v. *United States*, 465 U.S. 259, 265 (1984); *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 264-265 (1982); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306 (1962). As the Court stated in *DiBella* v. *United States*, 369 U.S. 121, 124 (1962), "[t]he general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment."[3] And a "final judgment" for this purpose, as the Court recently reiterated, is one that " 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Van Cauwenberghe* v. *Biard*, No. 87-336 (June 13, 1988), slip op. 4 (footnote and citation omitted); accord *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373 (1981); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 (1978).

The final judgment rule serves important purposes in both civil and criminal cases. By consolidating in one appeal all the grounds for challenging a trial court's judgment, the rule avoids delay, promotes efficient judicial administration, and reduces the ability of litigants to harass opponents by engaging in a succession of time-consuming and costly appeals. The final judgment rule also lessens the risk that appellate courts will render abstract rulings on questions of law presented in an insufficently developed factual context. And it reduces the likelihood that appellate courts will devote time and energy to the resolution of issues that may prove to be immaterial to the

[3] "The first Judiciary Act of 1789, 1 Stat. 73, established the general principle that only *final* decisions of the federal district courts would be reviewable on appeal." *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 83 (1981) (emphasis in original).

ultimate disposition of the case. Most importantly, the final judgment rule gives effect to Congress's determination that litigation is best managed at both the trial and appellate levels if the district courts are free of repeated second-guessing by the courts of appeals during the prejudgment stages of a case. See, *e.g.*, *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 429-430, 434, 436 (1985); *Flanagan*, 465 U.S. at 263-265; *Firestone*, 449 U.S. at 374; *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170-171 (1974); *Cobbledick*, 309 U.S. at 324-326; *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). In sum, as the Court stated in the *Cobbledick* case, 309 U.S. at 326, "finality * * * is the means for achieving a healthy legal system." For these reasons, this Court has long held that "the policy of Congress embodied in [28 U.S.C. 1291] is inimical to piecemeal appellate review of trial court decisions" (*Hollywood Motor Car Co.*, 458 U.S. at 265).

b. In the context of criminal prosecutions, Section 1291 contemplates appellate review only following conviction and the imposition of sentence, unless some exception to the final judgment rule applies. See *Berman* v. *United States*, 302 U.S. 211, 212 (1937). Since petitioners have not yet been tried, let alone convicted and sentenced, the order denying their Rule 6(e) motion to dismiss plainly is not final in the ordinary sense. The only exception to the usual requirement of finality that may be applicable in this case is the collateral order doctrine, which this Court first articulated in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). There, the Court held that a narrow category of trial court orders that are collateral to the litigation may be immediately appealed if certain stringent requirements are met.[4]

[4] There are two principal statutory exceptions to the final judgment requirement. First, 28 U.S.C. 1292(b) allows interlocutory appeals in

The trial court in the *Cohen* case had refused to order the plaintiff in a stockholder's derivative action to post the security for costs required by a New Jersey statute. The defendant sought immediate review of the question whether the state statute applied to derivative suits in federal courts. This Court upheld the defendant's right to appeal. It agreed that 28 U.S.C. 1291 disallows appeals "even from fully consummated decisions, where they are but steps towards final judgment in which they will merge" (*Cohen*, 337 U.S. at 546). The Court explained, however, that "the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case" (*ibid.*). The Court accordingly held that the trial court's order "appears to fall in that small class which finally determine

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civil cases by permission of the district court and the court of appeals, but only where resolution of a controlling question of law may materially advance the ultimate termination of the litigation. Significant for present purposes is that Congress elected to exclude criminal cases from Section 1292(b). Second, Congress has in recent years authorized certain interlocutory *prosecution* appeals in criminal cases (*e.g.*, 18 U.S.C. 2518(10)(b) and 3731). The reasons for this policy are evident. Because of the operation of double jeopardy principles, erroneous pretrial rulings adverse to the government will almost always be unreviewable following final judgment. In addition, institutional constraints (including the requirement that any government appeal be authorized by the Solicitor General) greatly reduce the risk of frivolous appeals or appeals taken for the purpose of delay. Indeed, both 18 U.S.C. 2518(10)(b) and 3731, para. 2, require the United States Attorney to certify that the appeal is not being "taken for purpose of delay" and mandate that the appeal be "diligently prosecuted." None of the considerations that support allowance of interlocutory prosecution appeals has force in the vast majority of potential defense interlocutory appeals, and it is therefore not surprising that, except in the purely collateral area of bail (18 U.S.C. 3147(b)), Congress has never expressly authorized interlocutory appeals by criminal defendants.

claims of right separate from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (*ibid.*).

As the Court has since explained, to qualify as an appealable collateral order excepted by *Cohen* from the final judgment rule, a district court order must, at a minimum, satisfy three separate requirements. First, "the order must conclusively determine the disputed question." *Coopers & Lybrand* v. *Livesay*, 437 U.S. at 468. Accordingly, an order does not satisfy the *Cohen* doctrine where it "is subject to revision in the District Court" (*id.* at 469), or is otherwise "tentative, informal or incomplete" (*Cohen*, 337 U.S. at 546). Second, the order must "resolve an important issue completely separate from the merits of the action" (*Coopers & Lybrand*, 437 U.S. at 468). Thus, the order must involve "a serious and unsettled question" (*Cohen*, 337 U.S. at 547; accord, *e.g.*, *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742-743 (1982)) that is genuinely "collateral" to the merits—"touching matters that will not 'affect, or * * * be affected by, decision of the merits of [the] * * * case' " (*DiBella* v. *United States*, 369 U.S. at 126 (citation omitted)), and not merely a " 'step[] towards final judgment in which [it] will merge' " (*Van Cauwenberghe* v. *Biard*, slip op. 10 (citation omitted)). Finally, the order must be "effectively unreviewable on appeal from a final judgment" (*Coopers & Lybrand*, 437 U.S. at 468 (footnote omitted)). The challenged order must therefore "involve[] an asserted right the legal and practical value of which could be destroyed if it were not vindicated before trial" (*United States* v. *MacDonald*, 435 U.S. 850, 860 (1978) (footnote omitted)), such that denial of immediate review would " 'render impossible any review whatsoever' "

(*Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. at 376 (citation omitted)).

c. Because of the historic policy against piecemeal review, however, this Court has repeatedly emphasized that the collateral order doctrine is a narrow and limited exception to the final judgment rule. "The importance of the final judgment rule has led the Court to permit departures from the rule 'only when observance of it would practically defeat the right to any review at all.' " *Flanagan* v. *United States*, 465 U.S. at 265 (citations omitted). The Court has therefore sanctioned interlocutory appeals "in only a limited category of cases" (*United States* v. *Hollywood Motor Car Co.*, 458 U.S. at 265), lest "the policy against piecemeal appeals * * * be swallowed by ever-multiplying exceptions" (*id.* at 270).

For example, if the right in question can be vindicated by the reversal of an adverse judgment, a party must await the entry of a final judgment before seeking appellate review of the district court's order.[5] An order is not immediately appealable merely because all the facts necessary to appellate review have been fully developed,[6]

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[5] See, *e.g.*, *Van Cauwenberghe*, slip op. 8-9 (an extradited person's claim to immunity from civil service of process); *Richardson-Merrell, Inc.* v. *Koller*, *supra* (disqualification of counsel in a civil case); *Firestone Tire & Rubber Co.* v. *Risjord*, *supra* (refusal to disqualify counsel in a civil case); *United States* v. *Hollywood Motor Car Co.*, *supra* (refusal to dismiss an indictment in a criminal case on the ground of alleged prosecutorial vindictiveness); *United States* v. *MacDonald*, *supra* (refusal to dismiss an indictment in a criminal case on speedy trial grounds); *Cobbledick* v. *United States*, *supra* (denial of a motion to quash subpoena); *Cogen* v. *United States*, 278 U.S. 221 (1929) (refusal to suppress evidence in a criminal case).

[6] See, *e.g.*, *Richardson-Merrell, Inc.* v. *Koller*, *supra*; *Firestone Tire & Rubber Co.* v. *Risjord*, *supra*; *United States* v. *Hollywood Motor Car Co.*, *supra*; *Abney* v. *United States*, 431 U.S. 651, 663 (1977) (claim that indictment fails to state an offense); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 29-31 (1943) (claim that indictment should be dismissed for lack of jurisdiction); *Heike* v. *United States*, 217 U.S. 423, 430-431 (1910) (claim of statutory immunity from conviction).

because an immediate appeal would avoid a substantial burden on a party,[7] because a trial court's ruling adjudicates important questions in the case,[8] or because that ruling may be erroneous.[9] Permitting an immediate appeal on such grounds would allow the collateral order exception to overtake the final judgment rule, thereby defeating the beneficial purposes served by the rule. See *Hollywood Motor Car Co.*, 458 U.S. at 270. The Court's decisions therefore make clear that the collateral order doctrine is a narrow exception to the final judgment rule and is applicable to only a small class of prejudgment orders. See *Richardson-Merrell*, 472 U.S. at 430-431.

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[7] See, *e.g.*, *Van Cauwenberghe*, slip op. 9-12 (order denying motion to dismiss on the ground of forum non conveniens); *Richardson-Merrell*, 472 U.S. at 434; *United States* v. *Ryan*, 402 U.S. 530, 532-534 (1971) (denial of motion to quash subpoena is not immediately appealable simply because compliance with the subpoena will impose a substantial burden on respondent); *Cobbledick*, 309 U.S. at 325 ("[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship").

[8] See, *e.g.*, *Carroll* v. *United States*, 354 U.S. 394, 406 (1957) ("[m]any interlocutory decisions * * * may be of grave importance to a litigant, yet are not amenable to appeal at the time entered"); *Cobbledick*, 309 U.S. at 325-326 ("rejection even of a constitutional claim * * * must await * * * conviction before its reconsideration by an appellate tribunal").

[9] See, *e.g.*, *Richardson-Merrell*, 472 U.S. at 436 ("the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress"); *Firestone*, 449 U.S. at 378 (quoting *Will* v. *United States*, 389 U.S. 90, 98 n.6 (1967)) ("interlocutory orders are not appealable 'on the mere ground that they may be erroneous' ").

2. The collateral order doctrine has been applied with particular strictness in criminal cases

Our legal system attaches "profound importance * * * [to] finality in criminal proceedings" (*Strickland* v. *Washington*, 466 U.S. 668, 693-694 (1984)), and thus the presumption against piecemeal review "is at its strongest in the field of criminal law" (*United States* v. *Hollywood Motor Car Co.*, 458 U.S. at 265). Excessive delay, this Court has explained, " 'is fatal to the vindication of the criminal law.' " *United States* v. *MacDonald*, 435 U.S. at 853-854 (citation omitted). By insisting on finality and prohibiting piecemeal review, the final judgment rule "discourage[s] undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases." *DiBella* v. *United States*, 369 U.S. at 124 (citation omitted). Accord *Abney*, 431 U.S. at 657; *Cobbledick*, 309 U.S. at 325. The Court has therefore "interpreted the requirements of the collateral-order exception to the final judgment rule with the utmost strictness in criminal cases." *Flanagan* v. *United States*, 465 U.S. 259, 265 (1984). Indeed, in the nearly 40 years since the *Cohen* case was decided, while the Court "frequently has considered the appealability of pretrial orders in criminal cases" (*MacDonald*, 435 U.S. at 853), it "has found only three types of pretrial orders * * * to meet the requirements" (*Flanagan*, 465 U.S. at 265-266).

First, in *Stack* v. *Boyle*, 342 U.S. 1 (1951), the Court held that an order denying a motion to reduce bail could be reviewed before trial. Writing separately in that case, Justice Jackson, who had authored the Court's opinion in *Cohen* two years earlier, explained that, like the question of posting security in *Cohen*, "an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—and unless it

can be reviewed before sentence, it never can be reviewed at all" (*id.* at 12).

Second, in *Abney* v. *United States*, 431 U.S. 651 (1977), the Court held that an order denying a motion to dismiss an indictment on double jeopardy grounds is subject to interlocutory review. The Court explained that "the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged" (*id.* at 659). Moreover, the Court stated (*id.* at 660), "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." In particular, it noted, "the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense." *Id.* at 660-661 (footnote omitted; emphasis in original). Thus, the Court reasoned that "if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs" (*id.* at 662 (emphasis in original)).

Finally, in *Helstoski* v. *Meanor*, 442 U.S. 500 (1979), the Court, applying the principles articulated in *Abney*, held that an order denying a motion to dismiss an indictment under the Speech or Debate Clause, Art. I, § 6, is subject to immediate appeal under the collateral order doctrine. As in *Abney*, the Court explained, "the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves' " (*id.* at

508, quoting *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967)).

Since the decision in *Helstoski*, the Court has consistently refused to apply the *Cohen* doctrine to orders in criminal cases. Indeed, the Court has emphasized that the orders appealed from in *Stack*, *Abney*, and *Helstoski* are "*sui generis*" (*Flanagan*, 465 U.S. at 267), and that those decisions should not be pushed beyond the special circumstances presented in each case. As the Court has explained, interlocutory review in criminal cases should be confined to claims that afford the defendant a "right not to be tried" and which therefore entitle the defendant to be heard in the appellate court before trial.

In *United States* v. *MacDonald*, *supra*, for example, the Court held that a defendant may not take an immediate appeal from an order denying his motion to dismiss an indictment, where the motion was based on an alleged violation of the Sixth Amendment right to a speedy trial. The Court emphasized that "[u]nlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all." *Id.* at 861.[10] More recently, in *Flanagan* v. *United States*,

[10] The Court observed (*MacDonald*, 435 U.S. at 860 n.7): "Admittedly, there is value—to all but the most unusual litigant—in triumphing before trial, rather than after it, regardless of the substance of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial. Double jeopardy claims are paradigmatic." The Court added that "[t]here perhaps is some superficial attraction in the argument that the right to a speedy trial—by analogy to these other rights—must be vindicated before trial in order to insure that no nonspeedy trial is ever held. Both doctrinally and pragmatically, however, this argument fails." *Id.* at 860-861.

supra, the Court held that a pretrial order disqualifying defense counsel in a criminal case is not subject to interlocutory review. Once again, the Court explained (*id.* at 266-267) that, unlike the rights in *Abney* and *Helstoski*, "it cannot be said that the right petitioners assert, whether based on the Due Process Clause of the Fifth Amendent or the Assistance of Counsel Clause of the Sixth Amendment, is a right not to be tried." And in *United States* v. *Hollywood Motor Car Co.*, 458 U.S. at 267-268, the Court could not find in the Due Process Clause a " 'right not to be tried.' " The Court therefore held that a claim of prosecutorial vindictiveness did not fit within the "narrow group of claims which meet the test of being 'effectively unreviewable on appeal from a final judgment' " (*id.* at 270).[11]

3. Under these principles, an order denying a motion to dismiss an indictment under Fed. R. Crim. P. 6(e) is not subject to interlocutory appeal

The trial court's order—denying petitioners' motion to dismiss the indictment under Rule 6(e)—fails to satisfy two prongs of the collateral order doctrine. First, the order does not "resolve an important issue completely separate from the merits of the action" (*Coopers & Lybrand*, 437 U.S. at 468). Second, it is not "effectively

[11] The Court acknowledged in *Hollywood Motor Car Co.* that "there is a superficial plausibility to the contention that any claim, particularly a constitutional claim, that would be dispositive of the entire case if decided favorably to a criminal defendant, should be decided as quickly as possible in the course of the litigation" (458 U.S. at 270). "But if such a principle were to be applied," the Court reasoned (*ibid.*), "the policy against piecemeal appeals in criminal cases would be swallowed by ever-multiplying exceptions."

unreviewable on appeal from a final judgment" (*ibid.* (footnote omitted)).

a. The fact that a Rule 6(e) claim is rendered harmless as a matter of law by a conviction at trial, see *United States* v. *Mechanik, supra*, demonstrates that such a claim is not "an important issue completely separate from the merits of the action" (*Coopers & Lybrand*, 437 U.S. at 468)). To meet that test, an order must "touch[] matters that will not 'affect, or * * * be affected by, decision of the merits of [the] * * * case' " (*DiBella*, 369 U.S. at 126 (citation omitted)). It is hard to imagine an issue that is more directly "affected by decision of the merits" than one that will become harmless as a matter of law in the event of a conviction at trial. Unlike the wrongful denial of bail (see *Stack* v. *Boyle, supra*), or the erroneous denial of a double jeopardy claim (see *Abney* v. *United States, supra*)—each of which constitutes a continuing injury to the defendant regardless of how the case is resolved on the merits—the wrongful denial of a Rule 6(e) allegation is effectively "cured," or at least proved harmless, by a conviction at trial.

To use a slightly different formulation, an order denying a Rule 6(e) claim is not collateral because, as a challenge to one aspect of the grand jury process, it is merely a " 'step[] towards final judgment in which [it] will merge' " (*Van Cauwenberghe* v. *Biard*, slip op. 10 (citation omitted)). The grand jury "serves the 'dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.' " *United States* v. *Sells Engineering, Inc.*, 463 U.S 418, 423 (1983) (citation omitted). See also *United States* v. *Calandra*, 414 U.S. 338, 343 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 701 (1972). It is designed "to inquire into the existence of possible criminal conduct and to return only well-founded

indictments" (*Branzburg*, 408 U.S. at 688), as well as to "shield against arbitrary accusations" (*United States* v. *Mandujano*, 425 U.S. 564, 573 (1976) (plurality opinion)) by " 'determin[ing] whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will' " (*Branzburg*, 408 U.S. at 687 n.23 (citation omitted)). But a conviction after trial demonstrates, beyond a reasonable doubt, that there *was* "possible criminal conduct" (*Branzburg*, 408 U.S. at 688), that the indictment *was* "well-founded" (*ibid.*), that the prosecution was *not* "arbitrary" (*Mandujano*, 425 U.S. at 573), and that the charges were *not* "dictated by an intimidating power or by malice and personal ill will" (*Branzburg*, 408 U.S. at 687 n.23 (citation omitted)). Thus, the functions performed by the grand jury are "steps," albeit important ones, toward trial on the merits. And a challenge such as petitioners' to the proceedings before the grand jury will "merge" into a final judgment of conviction (*Van Cauwenberghe*, slip op. 10), because the conviction will prove any error in the charging process to be harmless as a matter of law.[12]

It is true, of course, that Rule 6(e) serves public purposes in addition to protecting the defendant against a tainted charging decision by the grand jury. See *United States* v. *Sells Engineering, Inc.*, 463 U.S. at 424. But absent prejudice to the defendant with respect to the charging decision, a violation of the Rule would not lead to dismissal of the indictment, even if interlocutory review were permitted. See *Bank of Nova Scotia* v. *United States*,

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[12] See also *Parr* v. *United States*, 351 U.S. 513, 519 (1956) (citation omitted) (order dismissing defendant's first indictment after superseding indictment was filed is not appealable since it "was but a 'step toward final disposition of the merits of the case' and will 'be merged in the final judgment' ").

slip op. 4, 9. Therefore, in cases in which dismissal could be granted as a remedy—the only class of cases in which interlocutory review would serve any purpose at all—the Rule 6(e) violation cannot be viewed as "an important issue completely separate from the merits of the action."

b. An order denying a Rule 6(e) motion to dismiss also fails to meet the third prong of the collateral order doctrine, because it is not "effectively unreviewable on appeal from a final judgment" (*Coopers & Lybrand*, 437 U.S. at 468 (footnote omitted)). This Court has explained that to meet that criterion, the order must "involve[] an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial" (*MacDonald*, 435 U.S. at 860 (footnote omitted)). In criminal cases, the Court has further stated, the interest that would be defeated by denying interlocutory review ordinarily must "encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all" (*id.* at 861). The Court has emphasized "the crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges" (*Hollywood Motor Car Co.*, 458 U.S. at 269). Only "[t]he former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial. The latter does not." *Ibid.*[13]

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[13] Compare *Abney* v. *United States*, 431 U.S. at 661 (footnote omitted; emphasis in original) (Double Jeopardy Clause affords "a guarantee against being twice put to *trial* for the same offense"); and *Helstoski* v. *Meanor*, 442 U.S. at 508 (citation omitted) ("the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves' ") with *Flanagan*, 465 U.S. at 266-267 ("it cannot be said that the right petitioners assert, whether based on the Due Process Clause of the Fifth Amendment or on the Assistance of Counsel Clause of the Sixth Amendment, is a right not to be tried"); and *MacDonald*, 435 U.S. at 861 ("[u]nlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a 'right not to be tried' ").

Neither the Grand Jury Clause of the Fifth Amendment nor Rule 6(e) confers a right not to be tried where there has been a breach of grand jury secrecy. The Grand Jury Clause entitles a defendant not "to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. Even if it could be said that the Grand Jury Clause affords a "right not to be tried," it would be triggered only when a defendant is required to answer serious charges that were not made by a grand jury; it would not be triggered by procedural defects in the charging process. Indeed, this Court has long recognized that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (footnote omitted). See also *United States* v. *Calandra*, 414 U.S. 338, 344-345 (1974); *Lawn* v. *United States*, 355 U.S. 339, 349 (1958); *Ex parte United States*, 287 U.S. 241, 250 (1932); *Beavers* v. *Henkel*, 194 U.S. 73, 84-85, 88 (1904); *Bracy* v. *United States*, 435 U.S. 1301, 1303 (1978) (Rehnquist, Circuit Justice). There is no question in this case that petitioners were indicted by "a legally constituted and unbiased grand jury." The Grand Jury Clause therefore does not, by its terms, afford petitioners any right not to be tried.[14]

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[14] Petitioners contend (Br. 24) that the Grand Jury Clause "is a guarantee against being once put in jeopardy on an indictment returned by a grand jury whose decision to indict was substantially influenced by the government's violation of 6(e)." That contention, which petitioners make no effort to tie to the language of the Clause or to this Court's cases, cannot be squared with the Court's suggestion in *Bank of Nova Scotia* that Rule 6(e) violations do not amount to

Nor does Rule 6(e) itself create a right not to be tried. Nowhere in the rule is there any suggestion that criminal defendants are shielded under Rule 6 " 'not only from the consequences of litigation's results but also from the burden of defending themselves' " (*Helstoski*, 442 U.S. at 508 (citation omitted)). To be sure, a district court has the authority to dismiss an indictment for violations of Rule 6(e), see *Bank of Nova Scotia*, slip op. 5, 7, 9, and thereby to spare the defendant the obligation to stand trial. But that does not mean that a defendant with a valid Rule 6(e) claim for dismissal is entitled not to be tried before that right can be vindicated on appeal. As the *MacDonald* case makes clear, "the fact that this Court has held dismissal of the indictment to be [a] proper remedy • • • does not mean that a defendant enjoys a 'right not to be tried' which

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constitutional error. The Court sharply distinguished between non-constitutional claims and other, more "fundamental" errors "in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair" (*id.* at 6). The Court explained that racial and gender discrimination in the selection of the grand jury were examples of "fundamental" and "structural" error (*ibid.*), and it concluded that the errors complained of by the defendants, including a series of Rule 6(e) violations, did not amount to "constitutional error" (see slip op. 7). See also *Costello* v. *United States*, 350 U.S. at 363 & n.7 (citing *Pierre* v. *Louisiana*, 306 U.S. 354 (1939), which involved racial discrimination in the selection of state grand jurors, as an instance in which there was not "a legally constituted and unbiased grand jury"). Petitioners' passing reliance (Br. 24) on the Court's decision in *Stirone* v. *United States*, 361 U.S. 212 (1960), is misplaced. In that case, the Court held that the government had violated the defendant's right to be tried only on the charges found by the grand jury, when it proceeded on a theory of prosecution that was at significant variance with the charges in the indictment. The case did not involve Rule 6(e), let alone suggest that the Grand Jury Clause entitles a defendant not to be tried on an indictment that may be the product of a Rule 6(e) violation.

must be safeguarded by interlocutory appellate review" (435 U.S. at 860 n.7).[15]

In short, a procedural error in the charging process does not confer a right not to be tried. Petitioners' Rule 6(e) claim thus cannot justify interlocutory review under the collateral order doctrine. See also *Abney*, 431 U.S. at 663 ("petitioners' challenge to the sufficiency of the indictment does not come within the *Cohen* exception").

It may be argued, however, that because a Rule 6(e) error will be rendered harmless by a conviction, it is, for that reason alone, "effectively unreviewable," even though the Grand Jury Clause and Rule 6 do not otherwise entail a right not to be tried. We disagree. This Court has never suggested that the ordinary operation of the harmless error rule makes a claim "effectively unreviewable" for purposes of the collateral order doctrine. To the contrary, the Court rejected a similar contention in *Stringfellow* v. *Concerned Neighbors in Action*, No. 85-184 (Mar. 9, 1987).

In *Stringfellow* the respondent sought to take an interlocutory appeal from an order denying its motion to intervene as of right in an ongoing litigation and granting it only permissive intervention subject to certain conditions. Respondent acknowledged that it would have an opportunity to pursue a post-trial appeal. It contended, however, that, "given the realities of complex litigation," an appellate court would "be reluctant to vacate the judgment because of an erroneous intervention order" (slip op. 5-6). Thus, respondent reasoned, its post-trial right to appeal would be "academic at best" (slip. op. 6). This Court

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[15] Moreover, here, as in *MacDonald*, it is the breach of secrecy "before trial, not the trial itself, that offends against" the proscriptions of Rule 6(e). "Proceeding with the trial does not cause or compound the deprivation already suffered." *MacDonald*, 435 U.S. at 861.

rejected that contention as "largely beside the point" (*ibid.*). The Court explained that "[a]lthough it may be difficult for [respondent] to show that the harm from the intervention order is sufficiently great to overturn the final judgment, this has little bearing on whether [respondent] has the right to an interlocutory appeal under the collateral order doctrine" (*ibid.*).[16]

Moreover, if a claim is "effectively unreviewable" simply because, after judgment, it will be subject to the harmless error rule, then a wide array of claims would fall within the *Cohen* doctrine. As the Seventh Circuit has noted, "[i]f that were enough to justify an appeal, every objection to a grant or denial of civil discovery would be appealable." *United States* v. *Daniels*, 848 F.2d 758, 760 (7th Cir. 1988).[17] In every criminal case, moreover, there are dozens of pretrial and midtrial rulings that, after a conviction, will be reviewed under a deferential standard, such as abuse of discretion, and will be subject to the harmless error rule. In the vast majority of cases, claims of error as to those rulings will likewise be unremediable on appeal. This Court has never suggested, however, that, by virtue of the likelihood that the errors will be found harmless, any of those issues may be appealed before judgment.

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[16] The Court observed that "[t]he difficulties of which [respondent] complains are the same as those faced by any party who is subject to an adverse pretrial order. A party who has had one of several claims dismissed before trial, for example, may similarly believe that the chances of overturning the judgment on this ground are small, even if the dismissal turns out to be erroneous. Yet unless the district court specifically holds otherwise, challenges to this type of order can be raised only after judgment." *Stringfellow*, slip op. 6.

[17] Accord *EEOC* v. *Neches Butane Products Co.*, 704 F.2d 144, 148 (5th Cir. 1983) (to be "effectively unreviewable" under *Cohen* "requires considerably more than either expense or near irreversibility—qualities common to virtually all discovery orders").

B. The Collateral Order Doctrine Should Not Be Expanded To Cover An Order Denying A Rule 6(e) Motion To Dismiss An Indictment

Petitioners' claim "does not justify expanding the small class of criminal case orders covered by the collateral-order exception to the final judgment rule—either by eliminating any of the *Coopers & Lybrand* conditions or by interpreting them less strictly than the Court's cases have done. The costs of such expansion are great, and the potential rewards are small." *Flanagan* v. *United States*, 465 U.S. 259, 269 (1984).

1. A pretrial appeal necessarily interrupts the trial process, and "[i]n criminal cases such interruption exacts a presumptively prohibitive price" (*Flanagan*, 465 U.S. at 269). First, society has a strong interest in a speedy trial for indicted defendants, an interest "which exists separate from, and at times in opposition to, the interests of the accused" (*Barker* v. *Wingo*, 407 U.S. 514, 519 (1972); accord *United States* v. *Mechanik*, 475 U.S. at 72; *United States* v. *Hasting*, 461 U.S. 499, 509 (1983)). In particular, as the Court has stated, "[d]elay between arrest and punishment prolongs public anxiety over community safety" (*Flanagan*, 465 U.S. at 264), and thus "[t]he public interest in a broad sense * * * commands prompt disposition of criminal charges" (*Strunk* v. *United States*, 412 U.S. 434, 439 n.2 (1973)). Delay also impairs the effectiveness of the trial as a means of discovering the truth. "As time passes, the prosecution's ability to meet its burden of proof may greatly diminish: evidence and witnesses may disappear, and testimony becomes more easily impeachable as the events recounted become more remote" (*Flanagan*, 465 U.S. at 264; accord *Engle* v. *Isaac*, 456 U.S 107, 127-128 (1982); *MacDonald*, 435 U.S. at 862 (1978)).[18] In addi-

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[18] Petitioners' suggestion (Br. 36) that the government can always "preserve testimony through depositions under Rule 15, Federal Rules

tion, the greater the delay in bringing a defendant to trial, "the more tempting becomes his opportunity to jump bail and escape" (*Barker*, 407 U.S. at 520 (footnote omitted)), and the longer "the period during which [the] defendant[] * * * may commit other crimes" (*MacDonald*, 435 U.S. at 862). Finally, extensive delay between arrest and punishment may "adversely affect the prospects for rehabilitation" (*Flanagan*, 465 U.S. at 264; accord *Barker*, 407 U.S. at 520 (footnote omitted)).[19]

Moreover, the costs attributable to interruption and delay could not logically be confined to Rule 6(e) cases. If an order denying a Rule 6(e) claim is immediately appealable on the ground that it would otherwise become harmless under *Mechanik* after conviction, the same would hold true for a wide range of other grand jury motions that are routinely made in criminal cases and that are

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of Criminal Procedure" offers cold comfort. Under Rule 15, depositions can be taken only in "exceptional circumstances." Moreover, a deposition is ordinarily a far less satisfactory means of presenting evidence to a jury than live testimony.

[19] These policies apply not only to delays in the trial process but also to interruptions that delay grand jury investigations. "It is no less important to safeguard against undue interruption of the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the 'orderly progress' of investigation should no more be encouraged in one case than in the other." *Cobbledick* v. *United States*, 309 U.S. at 327. Thus, in the *Cobbledick* case, and more recently in *United States* v. *Ryan*, 402 U.S. 530 (1971), the Court refused to permit interlocutory appeals from orders denying motions to quash grand jury subpoenas. As the Court has explained in a somewhat different context, "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973). Accord *Costello*, 350 U.S. at 363.

equally governed by *Mechanik* on appeal.[20] Indeed, in two of its recent cases, the Ninth Circuit, relying on *Mechanik*, adopted precisely that position. See *United States* v. *Dederich*, 825 F.2d 1317, 1320-1321 (1987); and *United States* v. *Benjamin*, 812 F.2d 548, 552-553 (1987). Apart from leading to congestion in the courts of appeals, such a broad expansion of the collateral order doctrine would

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[20] See, *e.g.*, *United States* v. *Hefner*, 842 F.2d 731, 732, 733 (4th Cir. 1988) (*Mechanik* bars claim that indictment was invalid because the grand jury foreman had been convicted of a felony nearly 30 years ago); *United States* v. *Fountain*, 840 F.2d 509, 513-515 (7th Cir. 1988) (*Mechanik* bars claims that prosecutor neglected to present exculpatory evidence and that the entire presentation to the grand jury was hearsay); *United States* v. *Bucci*, 839 F.2d 825, 831-832 (1st Cir. 1988) (*Mechanik* bars claims that prosecutor failed to impeach perjurious testimony before the grand jury and offered false and inflammatory evidence); *United States* v. *McKie*, 831 F.2d 819, 821-828 (8th Cir. 1987) (*Mechanik* bars claim that prosecutor's remarks to the grand jury induced it to indict the defendant on more than one count); *United States* v. *Kouba*, 822 F.2d 768, 773-774 (8th Cir. 1987) (*Mechanik* bars claims that prosecutor introduced misleading summaries of testimony to the grand jury; that the prosecutor called witnesses solely to make them invoke the Fifth Amendment in front of the grand jury; and that a government investigator wrongfully called himself an agent of the grand jury and administered oaths to potential witnesses prior to taking their statements); *Porter* v. *Wainwright*, 805 F.2d 930, 941-942 (11th Cir. 1986), cert. denied, No. 86-6811 (June 8, 1987) (*Mechanik* bars claim that a grand jury member was biased because he was related to the victims and that the prosecutor wrongfully withheld that information from the defense); *United States* v. *Thomas*, 788 F.2d 1250, 1254 (7th Cir.), cert. denied, 479 U.S. 853 (1986) (*Mechanik* bars claims that prosecutor asked the defendant improper questions before the grand jury; that he failed to present exculpatory evidence; and that he improperly advised the grand jury that the defendant's legal theories were incorrect).

seriously disrupt the timely processing of criminal charges in the trial courts.[21]

What is more, challenges to grand jury proceedings are quite easily devised, and in lengthy, complex grand jury investigations, the proceedings can easily become "fertile ground to be combed for evidentiary or other error." *United States* v. *Bari*, 750 F.2d 1169, 1176 (2d Cir. 1984), cert. denied, 472 U.S. 1019 (1985). Defendants ordinarily have every incentive to seek to defeat or at least delay the prosecution as well as to obtain discovery not otherwise available concerning the government's case. Not surprisingly, motions to dismiss indictments for possible grand jury irregularity are already common fare in the federal system.[22] Indeed, trial practice guides for defense counsel

[21] The experience in the Ninth Circuit since its decisions in *Benjamin* and *Dederich* belies petitioners' prediction (Br. 36) that "the delay involved in such * * * appeal[s is not] likely to be lengthy." For example, the defendants in *United States* v. *Rosendin Elec. Inc.*, No. 87-1115 (9th Cir. July 20, 1988), were scheduled to go to trial on May 18, 1987, on charges that they had rigged bids in violation of Section 1 of the Sherman Act. The district court had previously denied their motion to dismiss the indictment under Fed. R. Crim. P. 6. The defendants thereafter took an interlocutory appeal, and oral argument was heard, on an expedited basis, on May 11, 1988. On July 20, 1988, more than a year after the case had been scheduled for trial, the court of appeals affirmed the district court's order. The *Benjamin* and *Dederich* cases themselves have a similar history. The court of appeals initially denied the government's motion to dismiss the *Benjamin* case on March 11, 1987 (812 F.2d 548), and the *Dederich* case on August 19, 1987 (825 F.2d 1317). The court then consolidated the appeals and heard argument on March 15, 1988. It issued a final decision affirming the district court's orders on July 7, 1988.

[22] See, *e.g.*, *Bank of Nova Scotia* v. *United States*, No. 87-578 (June 22, 1988) (alleging violations of Rule 6(d) and (e), harassment of a grand jury witness, misuse of statutory immunity provisions, calling witnesses before the grand jury solely to elicit a Fifth Amendment

specifically refer to the numerous tactical advantages of such pretrial motions.[23] The Court's practical concern in *MacDonald* is thus equally applicable here: if a Rule 6(e) claim falls within the *Cohen* doctrine, then "any defendant can make a pretrial motion for dismissal * * * and, if

claim, misstatements of prior testimony, and misleading characterizations of witnesses as agents of the grand jury); *United States* v. *Mechanik*, *supra* (alleging violation of Rule 6(d) by simultaneous presence and testimony of two goverment witnesses); *United States* v. *Thomas*, 788 F.2d 1250, 1254 (7th Cir.), cert. denied, 479 U.S. 853 (1986) (alleging improper remarks by prosecutor concerning defendant's theory of defense); *United States* v. *Buchanan*, 787 F.2d 477, 487 (10th Cir. 1986) (alleging error in instructions to the grand jury); *United States* v. *Pino*, 708 F.2d 523, 529-530 (10th Cir. 1983) (alleging intimidation of a witness); *United States* v. *Romano*, 706 F.2d 370, 374 (2d Cir. 1983) (alleging failure to give sufficient entrapment instructions to the grand jury); *United States* v. *Levine*, 700 F.2d 1176, 1178-1181 (8th Cir. 1983) (alleging use of inadmissible evidence and failure to present evidence of defendant's proffered alibi); *United States* v. *Mayers*, 670 F.2d 126, 128-129 (9th Cir. 1982) (alleging Rule 6(e) violation and fact that fewer than 12 grand jurors heard all the evidence presented); *United States* v. *Trass*, 644 F.2d 791, 792-797 (9th Cir. 1981) (alleging excessive use of hearsay and failure to present exculpatory evidence); *United States* v. *Cederquist*, 641 F.2d 1347, 1353 (9th Cir. 1981) (alleging fact that prosecutor submitted proposed indictment prior to the close of testimony); *United States* v. *Chanen*, 549 F.2d 1306 (9th Cir.), cert. denied, 434 U.S. 825 (1977) (alleging that prosecutor read transcripts of first grand jury's proceedings to second grand jury); *United States* v. *Narciso*, 446 F. Supp. 252, 297 (E.D. Mich. 1977) (alleging failure to record testimony of certain witnesses).

[23] See, *e.g.*, 1 A. Amsterdam, *Trial Manual for the Defense of Criminal Cases* § 172 (1984); 1 S. Allen, I. Rosen, D. Winston & J. Kruskal, *Criminal Defense Techniques* § 6A.02[5] (1988); B. Gershman, *Prosecutorial Misconduct* §§ 2.1-2.9 (1985); National Lawyers Guild, *Representation of Witnesses Before Federal Grand Juries* § 13.4(b)(1) (3d ed. 1985).

§ 1291 is not honored, could immediately appeal its denial" (435 U.S. at 862-863).

The present case shows how easy it is to devise a Rule 6(e) motion to dismiss. Petitioners contend that the government violated Rule 6(e) by attaching to its motion papers in the *Allegany Bitumens* case a memorandum that it had previously filed in a civil action related to this case. Petitioners assert that the attached memorandum revealed that Midland had filed certain pretrial motions (Br. 11-12); that the grand jury was investigating possible antitrust violations in the road paving business in New York (Br. 12); and that Bradford Banks was expected to be called before the grand jury (Br. 12). Petitioners speculate that the grand jury may have learned, through these disclosures, of the motions filed by Midland and may have "concluded that such grand jury motions, along with other unidentified grand jury motions, constituted evidence of consciousness of guilt justifying the indictment of the petitioners" (Br. 16). Petitioners also surmise that selective disclosures of grand jury material may have induced one of their co-conspirators to enter into a cooperation agreement with the government (Br. 30-31 & n.6).

The district court readily dismissed those allegations (Pet. App. 1-2), and it did so correctly. Some of the purported disclosures have little or nothing to do with Rule 6(e), since they do not involve "matters occurring before the grand jury." See *In re Grand Jury Matter*, 682 F.2d 61, 63 (3d Cir. 1982); *In re Grand Jury Investigation*, 610 F.2d 202, 216 (5th Cir. 1980). Moreover, virtually all of the alleged revelations, as the district court found (Pet. App. 2), were already a matter of public record, chiefly as a result of Midland's own unsealed filings and statements in open court. See pages 2-3, *supra*. And it is hard to see how any of the alleged disclosures could possibly have prejudiced the grand jury's determination of probable

cause. Cf. *Bank of Nova Scotia*, slip op. 9 (alleged Rule 6(e) violations, including "publicly identifying the targets and the subject matter of the grand jury investigation[,] * * * could not have affected the charging decision"). Petitioners' suggestion that the prosecutor somehow intended "to conceal the violation of Rule 6(e)" (Br. 32 n.7) is based on nothing more than the government's use of the word "letter" rather than "memorandum" to describe the attachment in the *Allegany Bitumens* case. In addition, that suggestion is belied by petitioners' own concession at a hearing before the district court that they "do not contend that this violation of Rule 6(e) * * * was intentional." Sept. 18, 1987 Tr. 3. In short, this case, and countless others just like it, justify the Court's concern in *MacDonald*: there is nothing about Rule 6, or the grand jury process generally, that "inherently limits the availability of the claim" (435 U.S. at 862).

2. Perhaps recognizing the extravagant costs that would be entailed by a broad rule permitting interlocutory appeals dealing with grand jury claims, petitioners propose that only a "narrow" (Br. 28) category of grand jury errors be made subject to interlocutory review. In particular, petitioners suggest that interlocutory review should be permitted only "for government misconduct so totally intertwined with the grand jury's ability to operate as an independent body of citizens that the effect is likely to impact on the determination of probable cause" (*ibid.*). Petitioners believe that Rule 6(e) violations fall within that "narrow" category, since "the unwarranted disclosure of Rule 6(e) information[] compromises the integrity of the grand jury by sapping its independence" (Br. 30).

That is no solution at all. If the right to interlocutory review requires merely an allegation that a Rule 6 error affected the grand jury's "independence" and thus its "deter-

mination of probable cause" (Br. 28), few defendants will forsake the trip to the court of appeals. Claims like that are made all the time, and the prospect of pretrial appellate review would simply add to the inducements for defendants to make such allegations routinely.

In any event, the right to interlocutory review cannot plausibly hinge, as petitioners insist it should, on whether an alleged Rule 6 violation may be said to have affected the grand jury's independence in a particular instance. This Court has made clear that "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll* v. *United States*, 354 U.S. 394, 405 (1957). The Court has consistently recognized that the factual circumstances that underlie a would-be appellant's claim, however "extraordinary" they are alleged to be, are immaterial for the purpose of determining whether a district court order rejecting that claim qualifies under the collateral order doctrine. See *Van Cauwenberghe* v. *Biard, supra*, slip op. 11; *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. at 438-439; *United States* v. *MacDonald*, 435 U.S. at 857-858 n.6; *Carroll*, 354 U.S. at 405. Under the governing jurisdictional statute, 28 U.S.C. 1291, the courts of appeals have the power to review only "final decisions," a concept that Congress defined "in terms of categories," not individual cases (*Carroll*, 354 U.S. at 405). Accordingly, whether the district court order denying the Rule 6(e) motion in this case is an appealable "final decision" depends on whether such orders, "in the generality of cases" (*ibid.*), fit into that well defined and narrowly circumscribed category of interlocutory orders adjudicating rights that "can and should be protected by appeal prior to judgment" (*Richardson-Merrell*, 472 U.S. at 436).

3. While the costs of expanding the collateral order doctrine to cover petitioners' claim would be great, the

corresponding benefits would be insubstantial. We say that for three reasons.

First, there is no reason to believe that a significant number of Rule 6(e) claims are incorrectly resolved at the trial level and therefore require correction by an appellate court on an interlocutory basis. To secure the dismissal of an indictment, a defendant must show that an alleged grand jury error prejudiced the grand jury's determination of probable cause. See *Bank of Nova Scotia* v. *United States, supra*. Because the standard of probable cause is not an exacting one (cf. *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983); *United States* v. *Ventresca*, 380 U.S. 102, 108-109 (1965)), it is quite difficult to show that, but for a particular procedural error, the grand jury would not have indicted (cf. *Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978)). Such a showing is likely to be possible only in cases of egregious grand jury error, and trial judges are not likely to overlook errors of that magnitude. It follows, in our view, that in the vast majority of cases the denial of a Rule 6(e) motion to dismiss is correct, and does not warrant correction by a court of appeals under the collateral order doctrine.[24]

Second, there is no reason to believe that any significant number of Rule 6(e) claims that have been incorrectly denied by the district court will be corrected by the courts of appeals on interlocutory review. Cf. *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. at 434. We are aware of no case in which a court of appeals has ever ordered an indictment dismissed because of a Rule 6(e) violation, either

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[24] What is more, a disclosure of Rule 6(e) material, by definition, reveals only matters that have "occur[red] before the grand jury." Except in the rare case, a disclosure of matters that the grand jury already knows should not prejudice its determination of probable cause.

before or after *Mechanik*.[25] As Judge Friendly explained in another context, "the likelihood of reversal is too negligible to justify the delay and expense incident to an appeal and the consequent burden on hardpressed appellate courts." *Donlon Indus. Inc.* v. *Forte*, 402 F.2d 935, 937 (2d Cir. 1968).

Finally, even in the rare case in which a defendant might prevail in an interlocutory appeal, he would not secure much of a victory. Unlike success on a double jeopardy or Speech or Debate Clause claim, success on a Rule 6(e) motion to dismiss an indictment ordinarily leaves the government free to re-present the case to another grand jury. See *United States* v. *Blue*, 384 U.S. 251, 255 n.3 (1966). Except in cases in which the original grand jury error was truly egregious and made the difference between indictment and a decision by the grand jury not to indict, the second grand jury is likely to indict the defendant again.

It is conceivable, of course, that there may be some cases in which the loss of an opportunity for interlocutory review will deprive a defendant of a potentially successful motion to dismiss. That abstract possibility, however, is too slight to justify the huge costs associated with allowing all defendants to take immediate appeals from orders denying Rule 6(e) motions. As the Court has noted in

[25] Indeed, we are aware of only three cases in which a court of appeals has reversed a district court and ordered the dismissal of an indictment because of grand jury abuse of any kind. See *United States* v. *Hogan*, 712 F.2d 757 (2d Cir. 1983) (prosecutor engaged in inflammatory and misleading conduct before the grand jury); *United States* v. *Basurto*, 497 F.2d 781 (9th Cir. 1974) (prosecutor knowingly used perjured testimony before the grand jury); *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972) (prosecutor used hearsay evidence without advising the grand jury that the evidence was hearsay). In a fourth case, *United States* v. *Serubo*, 604 F.2d 807 (3d Cir. 1979), the court remanded the case for further proceedings on the defendant's claim of grand jury abuse.

other contexts, the "trial on the merits [should be] the 'main event' " (*Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977)), and "the prominence of the trial itself" (*Engle* v. *Isaac*, 456 U.S. at 127) should not be overshadowed by a focus on other stages of the proceeding. "Defendants are not entitled * * * to a rule which would result in interminable delay but add nothing to the assurance of a fair trial." *Costello* v. *United States*, 350 U.S. at 364. In our view, the costs of permitting interlocutory review of Rule 6(e) motions are sufficiently evident and substantial, and the absence of corresponding benefits sufficiently clear, that the collateral order doctrine should not be enlarged to accommodate petitioners' claim.

4. We recognize that the consequence of our position is that a certain class of claims, if decided erroneously by the district courts, may not be remediable by the courts of appeals.[26] But this Court has long held that "[a]n appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal." *McKane* v. *Durston*, 153 U.S. 684, 687 (1894). Rather, "the right to a judgment from more than one court is a matter of grace" (*Cobbledick*, 309 U.S. at 325) and "is wholly within the discretion of the State to allow or not to allow" (*McKane*, 153 U.S. at 687). Indeed, "[n]ot until 1889 was there review as of right in criminal cases" (*Cobbledick*, 309 U.S. at 325).

[26] In *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. at 378-379 n.13, the Court suggested that, "in the exceptional circumstances for which it was designed," a writ of mandamus would be appropriate to review a district court's denial of a disqualification motion. It may well be that the writ will also be available to review the interlocutory denial of a Rule 6(e) motion in a criminal case, provided, of course, that the strict standards for mandamus have been satisfied. See *Will* v. *United States*, 389 U.S. 90 (1967).

It follows that "the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper." *McKane*, 153 U.S. at 687-688. That is precisely what Congress has done—by restricting appellate review to final decisions and by subjecting such review to a harmless error standard that requires courts of appeals to disregard "[a]ny errors or defects which do not affect the substantial rights of the parties" (28 U.S.C. 2111; see also Fed. R. Crim. P. 52(a)). If, as here, those procedural rules commit a certain class of decisions, as a practical matter, to the unremediable discretion of the district courts, that is a judgment that Congress is entitled to make, and it is consistent with congressional practice over the years.

Petitioners suggest (Br. 36-37), however, that unless this Court affirms the right to interlocutory review, with the attendant possibility that indictments may be dismissed under Rule 6(e), there will be no effective manner of "deterring prosecutors from violations of 6(e) and other similar types of misconduct" (Br. 37). Petitioners do not allege, however, that there has been any significant, systematic abuse of the grand jury warranting the creation of a novel right to interlocutory review. In any event, as this Court emphasized in *Bank of Nova Scotia*, there are several available alternatives to procedures that culminate in dismissal—including contempt, disciplinary proceedings, and criticism in published opinions (slip op. 12).[27] Each of those remedies "allow[s] the court to focus

[27] The sanction of contempt is specifically provided for by Rule 6(e). See Fed. R. Crim. P. 6(e)(2). The reference to contempt in the Rule suggests that contempt was intended to be the principal means of remedying Rule 6(e) violations, and that, contrary to petitioners' claim (Br. 36-37), contempt is regarded as an adequate remedy for enforcing the Rule.

on the culpable individual" (*ibid.*). And each may be pursued after a final judgment, sparing the courts and society the extravagant costs of frequent, interlocutory appeals.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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